

Case No. 96-957

Supreme Court, U.S.

FILED

15 1997

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

MELVIN JEFFERSON, individually
and as the Administrator of the
Estate of Alberta K. Jefferson;
LEON JEFFERSON; and BENJAMIN JEFFERSON,
Petitioners,

vs.

CITY OF TARRANT, ALABAMA,
Respondent.

ON WRIT OF CERTIORARI TO
THE ALABAMA SUPREME COURT

JOINT APPENDIX

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**PETITION FOR CERTIORARI FILED
NOVEMBER 27, 1996
CERTIORARI GRANTED MARCH 31, 1997**

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CHRONOLOGICAL LISTING OF RELEVANT DATES

June 21, 1994	Civil Complaint and Demand for Jury Trial filed
August 5, 1994	Defendants' Motion to Dismiss filed
August 8, 1994	Defendants' Motion to Dismiss Overruled, 30 days to Answer
June 16, 1995	Defendants' Answer to Complaint filed
June 24, 1995	Defendants' Motion for Summary Judgment filed
June 30, 1995	Defendants' Motion to Limit Plaintiff's Demand for Judgment to Statutory Limit filed
June 30, 1995	Defendants' Motion for Judgment on the Pleadings filed
July 14, 1995	Plaintiffs' Opposition to Defendants' Motion for Judgment on the Pleadings and Motion to Limit Plaintiffs' Demand for Judgment to Statutory Limit filed
July 16, 1995	Defendants' Motion to Strike Plaintiffs' Opposition to Summary Judgment and Judgment on the Pleadings filed
July 17, 1995	Defendants' Motion for Summary Judgment Overruled by Judge Drayton James

CHRONOLOGICAL LISTING OF RELEVANT DATES

July 17, 1995 Defendants' Motion to Limit Plaintiff's Demand for Judgment to Statutory Limit Overruled by Judge Drayton James

July 17, 1995 Defendants' Motion for Judgment on the Pleadings Granted as to Punitive Damages; Overruled as to Compensatory Damages entered by Judge Drayton James

July 17, 1995 Statement of Circuit Court Judge

August 23, 1995 Supreme Court of Alabama Order granting permission to petitioner to appeal from the interlocutory order entered on July 17, 1995

July 12, 1996 Supreme Court of Alabama Opinion where trial court's order is reversed and remanded

August 30, 1996 Supreme Court of Alabama Notice that application for rehearing is overruled

March 31, 1997 Petition for Writ of Certiorari is granted by the Supreme Court of the United States.

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually,)
and as the Administrator of the)
Estate of Alberta K. Jefferson; Leon)
Jefferson; Benjamin Jefferson,)
)
PLAINTIFFS)
)
VS.) CIVIL ACTION
) NO.: _____
CITY OF TARRANT, ALABAMA;)
CITY OF TARRANT, ALABAMA)
FIRE DEPARTMENT; A, B, C, D, E,)
whether singular or plural, that)
person or those persons who were)
the agents and/or employees of the)
City of Tarrant, who through their)
neglect, carelessness, and)
unskillfulness refused to rescue)
and/or revive the decedent, Alberta)
K. Jefferson; F, G, H, I, J, whether)
singular or plural, that person or)
those persons who were the agents)
and/or employees of the City of)
Tarrant Fire Department, who)
through their neglect, carelessness,)
and unskillfulness refused to rescue)
and/or revive the decedent, Alberta)
K. Jefferson; K, L, M, whether)
singular or plural, that person or)
those persons who were the agents)
and/or employees of the City of)
Tarrant who were responsible for)
participating in the reporting,)

recording, or sanctioning of the)
 neglect, carelessness, and)
 unskillfulness in refusing to rescue)
 and/or revive the decedent, Alberta)
 K. Jefferson; N, O, P, whether)
 singular or plural, that person or)
 those persons who were the agents)
 and/or employees of the City of)
 Tarrant Fire Department who were)
 responsible for participating in the)
 reporting, recording, or sanctioning)
 of the neglect, carelessness, and)
 unskillfulness in refusing to rescue)
 and/or revive the decedent, Alberta)
 K. Jefferson; R, S, T, whether)
 singular or plural, that person or)
 those persons who were the agents,)
 officers, or employees of the City)
 of Tarrant, and who were responsible)
 for the implementation of policies,)
 customs, or guidelines of the City of)
 Tarrant Fire Department relating to)
 their duties for the rescue and)
 reliable of persons at fire scenes,)
 procedures for the account ability)
 of the employees and agents of the)
 City of Tarrant Fire Department, and)
 procedures to prevent the continued)
 care less, unskillful, and negligent)
 failure to rescue and/or revive)
 persons at fire scenes; U, V, W,)
 whether singular or plural, that)
 person or those persons who were)
 the agents, officers or employees of)
 the City of Tarrant Fire Department,)
 and who were responsible for the)

implementation of policies, customs,)
 or guidelines of the City of Tarrant)
 Fire Department relating to their)
 duties for the rescue and reliable)
 of persons at fire scenes, procedures)
 for the account ability of the)
 employees and agents of the City of)
 Tarrant Fire Department, and)
 procedures to prevent the continued)
 care less, unskillful, and negligent)
 failure to rescue and/or revive)
 persons at fire scenes,)

DEFENDANTS.)

COMPLAINT

Come now the plaintiffs, Melvin Jefferson, individually and as Administrator of the Estate of Alberta K. Jefferson, Leon Jefferson, and Benjamin L. Jefferson, by and through their under signed counsel, and file this Complaint. As grounds for the relief requested, the plaintiffs state as follows:

PARTIES

1. Melvin Jefferson brings this action as the Administrator of the Estate of Alberta K. Jefferson, and as an individual, who was at the scene of the incident giving rise to this action.
2. Leon Jefferson is the son of the decedent, Alberta K. Jefferson, and was present at the scene of the incident giving rise to this action.
3. Benjamin Jefferson is the husband of the decedent, Alberta K. Jefferson, and was at the scene of the incident giving rise to this action.

4. The City of Tarrant, Alabama is a municipal corporation existing by virtue of the laws of the State of Alabama, and as a body corporate subject to suit in this court.

5. The City of Tarrant, Alabama Fire Department is a municipal fire department existing by virtue of the laws of the State of Alabama.

6. Fictitious parties A, B, C, D, and E are those persons who were the agents and/or employees of the City of Tarrant, Alabama who through their negligence, wantonness, carelessness and unskillfulness refused to rescue and/or revive the decedent, Alberta K. Jefferson.

7. Fictitious parties F, G, H, I, and J are those persons who were the agents and/or employees of the City of Tarrant, Alabama Fire Department who through their negligence, wantonness, carelessness and unskillfulness refused to rescue and/or revive the decedent, Alberta K. Jefferson.

8. Fictitious parties K, L, and M are those persons who were the agents and/or employees of the City of Tarrant who were responsible for participating in the reporting, recording and sanctioning of the negligence, wantonness, carelessness, and unskillfulness exhibited in refusing to rescue and/or revive the decedent, Alberta K. Jefferson.

9. Fictitious parties N, O, and P are those persons who were the agents and/or employees of the City of Tarrant Fire Department who were responsible for participating in the reporting, recording and sanctioning of the negligence, wantonness, carelessness, and unskillfulness exhibited in refusing to rescue and/or revive the decedent, Alberta K. Jefferson.

10. Fictitious parties R, S, and T are those persons who were the agents, officers, or employees of the City of Tarrant who were responsible for the implementation of

the policies, customs, or guidelines of the City of Tarrant Fire Department relating to duties to rescue and revive persons at fire scenes, procedures for the accountability of employees and agents of the City of Tarrant Fire Department, and procedures to prevent the continued careless, unskillful, negligent and wanton failure to rescue and/or revive persons at fire scenes.

11. Fictitious parties, U, V and W are those persons who were the agents, officers, or employees of the City of Tarrant Fire Department who were responsible for the implementation of the policies, customs, or guidelines of the City of Tarrant Fire Department relating to duties to rescue and revive persons at fire scenes, procedures for the accountability of employees and agents of the City of Tarrant Fire Department, and procedures to prevent the continued careless, unskillful, negligent and wanton failure to rescue and/or revive persons at fire scenes.

FACTUAL ALLEGATIONS

12. The Plaintiff incorporates by reference, as if fully set out herein, Paragraphs 1 through 11 above.

13. On or about December 4, 1993, the dwelling house located at 6017 58th Street North, Tarrant City, Alabama, became engulfed in flames.

14. The structure at the above-referenced address is within the municipality of the City of Tarrant and within the jurisdiction of the City of Tarrant Fire Department.

15. Located in the structure on that date was the decedent, Alberta K. Jefferson, a black woman.

16. As the house was engulfed in flames, the decedent was in a first floor bedroom of the house when members of the Tarrant City Fire Department arrived at the scene.

17. Despite the knowledge of the presence of the decedent in a first floor bedroom of the structure, employees of the City of Tarrant, and/or the City of Tarrant Fire

Department intentionally, wrongfully, wantonly, negligently, carelessly and unskillfully refused to attempt any rescue of the decedent, Alberta K. Jefferson.

18. No other people were in the burning structure on that day, and the defendants present were aware that no other people were in the structure as the house burned.

19. Agents and/or employees of the City of Tarrant and/or the City of Tarrant Fire Department intentionally, wantonly, and/or negligently, carelessly and unskillfully refused to attempt to revive the decedent, Alberta K. Jefferson, when she was carried from the burning dwelling house on December 4, 1993.

20. The proximate result of the intentional, wrongful, wanton, careless and unskilled actions and inactions of the Defendants was the death of the decedent, Alberta K. Jefferson.

21. Plaintiffs Melvin Jefferson, Leon Jefferson, and Benjamin Jefferson, all black men, were at the scene of the fire on December 4, 1993. Melvin and Leon Jefferson are the sons of the decedent, and Benjamin Jefferson is the husband of the decedent.

22. Plaintiffs, Melvin Jefferson, Leon Jefferson, and Benjamin Jefferson, continually pleaded with the defendants to rescue and revive the decedent, Alberta K. Jefferson.

23. The death of Alberta K. Jefferson was caused by the selective denial of fire protection to disfavored minorities, including citizens of the City of Tarrant. This selective denial of fire protection arose out of a pattern and practice of invidious discrimination by the City of Tarrant, Alabama and the City of Tarrant, Alabama Fire Department.

24. On or about January 21, 1994, Melvin Jefferson, as the Administrator of the Estate of Alberta K. Jefferson presented claims for payment to the City of Tarrant and

the City of Tarrant Fire Department for damages arising out of the occurrence described herein.

25. On or about February 11, 1994, Melvin Jefferson in individual capacity, Benjamin Jefferson and Leon Jefferson presented claims for payment to the City of Tarrant and the City of Tarrant Fire Department for damages arising out of the occurrence described herein.

COUNT I

26. The plaintiffs incorporate by reference, as if fully set out herein, paragraphs 1-25 above.

27. The defendants, through their acts or failures to act, caused the death of Alberta K. Jefferson. Said death was caused by the intentional, negligent, wanton, careless and unskilled actions and inactions of the defendants. These acts and failures to act resulted in the decedent's wrongful death under Ala. Code §6-5-41 (1993 Repl. Vol.)

WHEREFORE, PREMISES CONSIDERED, the plaintiffs demand judgment in both compensatory and punitive damages against each defendant, jointly and severally, in the sum of One Million Dollars (\$1,000,000.00), together with interest and the costs of this proceeding.

COUNT II

28. Plaintiffs, Melvin Jefferson, Leon Jefferson, and Benjamin Jefferson, incorporate by reference, as if fully set out herein, paragraphs 1 through 27 above.

29. The actions of the defendants were extreme, outrageous, and beyond all possible bounds of decency so as to cause extreme emotional distress.

WHEREFORE, PREMISES CONSIDERED, the plaintiffs demand judgment in both compensatory and punitive damages against each defendant, jointly and sever-

ally, in the sum of One Million Dollars (\$1,000,000.00), together with interest and the costs of this proceeding.

COUNT III

30. The plaintiffs incorporate by reference, as if fully set out herein, paragraphs 1 through 29 above.

31. This cause of action arises under the authority vested in the Court by virtue of 42 U.S.C. §1983.

32. The City of Tarrant, Alabama, is a municipal corporation existing by virtue of the laws of the State of Alabama, and as a body corporate subject to suit in this court.

33. The City of Tarrant Fire Department exists as an arm of, is organized and exists under the auspices the City of Tarrant, Alabama.

34. Fictitious parties A through W were at all times pertinent hereto, the agents and/or employees of the City of Tarrant, Alabama, an/or the City of Tarrant Fire Department, acting under color of state law.

35. Under federal law, the decedent was protected by the Fourteenth Amendment of the United States Constitution from deliberate indifference to her safety by the agents and/or employees of the City of Tarrant charged with responding to fires within the jurisdiction.

36. That at the time of the fire, it was known, or should reasonably have been known to the persons entrusted with the responsibility of rescuing and reviving victims of fires in the City of Tarrant, that the decedent, Alberta K. Jefferson, was in serious peril and in need of medical attention.

37. Because of the wanton and intentional character of the actions of each individual Defendant, the Estate of Alberta K. Jefferson, through its Administrator, Melvin Jefferson, is entitled to punitive damages under Federal law from each individually named defendant.

38. The actions and inactions of each individually named defendant in their individual and official capacities, constitute such deliberate indifference to Alberta K. Jefferson, that she was deprived of her right to life, as protected by the Fourteenth Amendment of the United States Constitution.

WHEREFORE, PREMISES CONSIDERED, the plaintiffs demand judgment against each defendant in both compensatory and punitive damages, jointly and severally, for the full value of Alberta K. Jefferson's life, and the pain, humiliation, and suffering she endured in the amount of One Million Dollars (\$1,000,000.00).

COUNT IV

39. Plaintiffs, Melvin Jefferson, Leon Jefferson, and Benjamin Jefferson, incorporate by reference, as if fully set out herein, paragraphs 1 through 38 above.

40. This cause of action arises under the authority vested in the Court by virtue of 42 U.S.C. §1983.

41. The City of Tarrant, Alabama is a municipal corporation existing by virtue of the laws of the State of Alabama, and as a body corporate is subject to suit in this Court.

42. Fictitious parties A through W were, at all times pertinent hereto, the agents and/or employees of the City of Tarrant, Alabama, and/or the City of Tarrant Fire Department, acting under color of state of law.

43. Under Federal law, the decedent was protected by the Fourteenth Amendment from invidious discrimination by the defendants in failing to rescue or revive her based on race by the agents and/or employees of the City of Tarrant and/or the City of Tarrant Fire Department charged with responding to fires within the jurisdiction.

44. The actions and inactions of the City of Tarrant and the City of Tarrant Fire Department in this case were part of a pattern and practice and custom of denying protective services to disfavored minorities.

45. Because of the intentional actions and inactions of each individual defendant, the Estate of Alberta K. Jefferson through its administrator, Melvin Jefferson, is entitled to punitive damages under Federal law from each individually named defendant.

46. The actions and inactions of each individually named defendant constitute a denial of equal protection of the laws to Alberta K. Jefferson, as protected by the Fourteenth Amendment of the United States Constitution.

WHEREFORE, PREMISES CONSIDERED, the plaintiffs demand judgment against each defendant in both compensatory and punitive damages, jointly and severally, for the full value of Alberta K. Jefferson's life, and

the pain, humiliation, and suffering she endured in the amount of One Million Dollars (\$1,000,000.00) .

RESPECTFULLY SUBMITTED,

/s/ Dennis G. Pantazis

Dennis G. Pantazis
Attorney for Plaintiffs

/s/ Brian M. Clark

Brian M. Clark
Attorney for Plaintiffs

OF COUNSEL:

GORDON, SILBERMAN, WIGGINS & CHILDS, P. C.
1400 SOUTHTRUST TOWER
BIRMINGHAM, ALABAMA 35203
(205) 328-0640

THE PLAINTIFFS HEREBY DEMAND TRIAL BY
STRUCK JURY.

/s/ Brian M. Clark

Brian M. Clark

Defendants' Addresses:

City of Tarrant
Clerk of the City of Tarrant
P. O. Box 170220
1604 Pinson Valley Parkway
Tarrant, Alabama 35217

City of Tarrant Fire Department
204 Ford Avenue
Tarrant, Alabama 35217

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)
and as the Administrator of the)
Estate of ALBERTA R. JEFFERSON;)
LEON JEFFERSON and BENJAMIN)
JEFFERSON,)
Plaintiffs,)
VS.) Civil Action No.
) CV 94-4523
)
CITY OF TARRANT, ALABAMA;)
CITY OF TARRANT, ALABAMA)
FIRE DEPARTMENT,)
Defendants.)

MOTION TO DISMISS

Come now the Defendants, CITY OF TARRANT, ALABAMA and CITY OF TARRANT, ALABAMA FIRE DEPARTMENT, and move the Court for an order dismissing Plaintiffs' complaint on the following grounds:

1. The Plaintiffs, MELVIN JEFFERSON, individually, LEON JEFFERSON and BENJAMIN JEFFERSON, have no cause of action against either of these Defendants for anything.

2. The complaints of these three in an individual capacity fail to state a claim upon which relief can be obtained.

3. Plaintiffs, MELVIN JEFFERSON, individually, LEON JEFFERSON and BENJAMIN JEFFERSON, claim that they were at the scene of the incident, which was a

fire in which ALBERTA JEFFERSON sustained fatal injuries, and they claim as a result of being there have a cause of action against these Defendants.

4. The Defendants deny that they owed a duty to the deceased and to MELVIN JEFFERSON in his capacity as administrator of the Estate of ALBERTA JEFFERSON to enter a raging inferno and risk their own lives in the remote possibility that anyone located in the building is not already deceased.

5. These Defendants breached no duty that they owed to MELVIN JEFFERSON in his capacity as a administrator of the Estate of ALBERTA JEFFERSON.

6. These Defendants move the Court for an order striking any claim against them in excess of \$100,000.

7. The claim of the Plaintiffs based on outrageous conduct fails to state a claim upon which relief can be obtained.

8. Defendants deny that any of the Plaintiffs have any cause of action against them under 43 U.S.C. § 1983.

9. Defendants deny that the Plaintiffs are entitled to any compensatory damages, as alleged in the complaint, but claim that the only remedy available to the Plaintiffs is under the Alabama Homicide Act.

/s/ John W. Clark, Jr.

JOHN W. CLARK, JR., Attorney for
CITY OF TARRANT, ALABAMA and
CITY OF TARRANT, ALABAMA
FIRE DEPARTMENT

OF COUNSEL:

CLARK & SCOTT, P.C.
3500 Blue Lake Drive, Suite 350
Birmingham, AL 35243-1907
(205) 967-9675

CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of August, 1994 mailed a copy of the foregoing Motion to the following attorneys of record:

Dennis G. Pantazis, Esq.
1400 SouthTrust Tower
Birmingham, AL 35203

/s/ John W. Clark, Jr.
OF COUNSEL

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)
and as the Administrator of the)
Estate of ALBERTA R. JEFFERSON;)
LEON JEFFERSON and BENJAMIN)
JEFFERSON,)
)
Plaintiffs,)
)
vs.	) Civil Action No.
	) CV 94-4523
CITY OF TARRANT, ALABAMA;)
CITY OF TARRANT, ALABAMA)
FIRE DEPARTMENT,)
)
)
Defendants.)

MOTION TO DISMISS

Come now the Defendants, CITY OF TARRANT, ALABAMA and CITY OF TARRANT, ALABAMA FIRE DEPARTMENT, and move the Court for an order dismissing Plaintiffs' complaint on the following grounds:

1. The Plaintiffs, MELVIN JEFFERSON, individually, LEON JEFFERSON and BENJAMIN JEFFERSON, have no cause of action against either of these Defendants for anything.

2. The complaints of these three in an individual capacity fail to state a claim upon which relief can be obtained.

3. Plaintiffs, MELVIN JEFFERSON, individually, LEON JEFFERSON and BENJAMIN JEFFERSON, claim that they were at the scene of the incident, which was a

fire in which ALBERTA JEFFERSON sustained fatal injuries, and they claim as a result of being there have a cause of action against these Defendants.

4. The Defendants deny that they owed a duty to the deceased and to MELVIN JEFFERSON in his capacity as administrator of the Estate of ALBERTA JEFFERSON to enter a raging inferno and risk their own lives in the remote possibility that anyone located in the building is not already deceased.

5. These Defendants breached no duty that they owed to MELVIN JEFFERSON in his capacity as a administrator of the Estate of ALBERTA JEFFERSON.

OVERRULED
30 days to answer

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)
and as the Administrator of the)
Estate of ALBERTA K. JEFFERSON;)
LEON JEFFERSON and BENJAMIN)
JEFFERSON,)
)
Plaintiffs,)
vs.	) Civil Action No.
	) CV 94-4523
CITY OF TARRANT, ALABAMA;)
CITY OF TARRANT, ALABAMA)
FIRE DEPARTMENT,)
)
Defendants.)

ANSWER TO COMPLAINT

The defendants, City of Tarrant, Alabama, a municipal corporation, and City of Tarrant, Alabama Fire Department, a municipal authority, make the following Answer to the Complaint:

First Defense

The defendants deny the material allegations of the Complaint and demand strict proof thereof.

Second Defense

The Complaint fails to state a claim for relief.

Third Defense

The Complaint fails to state a claim for relief under the Fourteenth Amendment to the Constitution or 43 U.S.C. § 1983.

Fourth Defense

The Complaint fails to state a claim for relief under any federal law or provision of the United States Constitution.

Fifth Defense

The Complaint fails to state a claim for relief for outrage.

Sixth Defense

The defendants are "governmental entities" as that term is used in § 11-93-2 Ala. Code, which limits the recovery of damages against a governmental entity to \$100,000.00 for bodily injury or death. Therefore, while the defendants deny that they are liable and that the plaintiffs are entitled to any recovery, pursuant to § 11-93-2, any judgment against the defendants must be limited to \$100, 000. 00.

Seventh Defense

The defendants deny the existence of a duty to protect the plaintiffs or their decedent, under Alabama tort law, on the occasion made the basis of this lawsuit, given the circumstances and dangers at the subject residence.

Eighth Defense

The defendants deny that any action or inaction on their part contributed to or proximately caused the injuries and death or damages made the basis of the Complaint.

Ninth Defense

The defendants plead the affirmative defense of contributory negligence .

Tenth Defense

The defendants affirmatively plead that this action is barred because the plaintiffs failed to file a sworn statement within the time and in the manner required by § 11-47-192 Ala. Code.

Eleventh Defense

The defendants aver that the plaintiffs have not been damaged or injured as alleged in the Complaint.

Twelfth Defense

The defendants aver that they did not breach any duties owed the plaintiffs on the occasion made the basis of this lawsuit.

Thirteenth Defense

The defendants deny that there exists a right to be reserved under the United States Constitution or that actions or inactions of the defendants associated with rescue or attempted rescue may give rise to a cognizable claim under 42 U.S.C. § 1983 or any other federal statute.

Fourteenth Defense

The plaintiffs lack standing.

Fifteenth Defense

The plaintiffs have failed to join a real party in interest or person needed for just adjudication.

Sixteenth Defense

The defendants aver that any award of punitive damages to the plaintiffs would be in violation of the constitu-

tional safeguards provided to them under the Constitution of the State of Alabama.

Seventeenth Defense

The defendants aver that any award of punitive damages to the plaintiffs in this case would be in violation of the constitutional safeguards provided to them under the Constitution of the United States of America.

Eighteenth Defense

The defendants aver that any award of punitive damages to the plaintiffs in this case would be in violation of the constitutional safeguards provided to them under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States in that punitive damages are vague and are not rationally related to legitimate government interests.

Nineteenth Defense

The defendants aver that any award of punitive damages to the plaintiffs in this case would be in violation of Article I, Section 6 of the Constitution of State of Alabama which provides that no person shall be deprived of life, liberty or property except by due process of law, in that punitive damages are vague and are not rationally related to legitimate government interests.

Twentieth Defense

The defendants aver that any award of punitive damages to the plaintiffs in this case would be in violation of the procedural safeguards provided to them under the Sixth Amendment to the Constitution of the United States in that punitive damages are penal in nature and, consequently, it is entitled to the same procedural safeguards accorded to criminal defendants.

Twenty-first Defense

The defendants aver that it is in violation of the self-incrimination clause of the Fifth Amendment to the Constitution of the United States of America to impose punitive damages against it, which are penal in nature yet compel it to disclose potentially incriminating documents and evidence.

Twenty-Second Defense

The defendants aver that it is in violation of the rights guaranteed by the Constitution of the United States of America and the Constitution of the State of Alabama to impose punitive damages against them which are penal in nature by requiring a burden of proof on the plaintiffs which is less than the "beyond a reasonable doubt" burden of proof required in criminal cases.

Twenty-Third Defense

The defendants aver that any award of punitive damages to the plaintiffs in this case would be in violation of the Eighth Amendment to the Constitution of the United States of America in that the damages would be an excessive fine in violation of the Excessive Fines Clause of the Eighth Amendment to the United States Constitution.

Twenty-Fourth Defense

The defendants aver that any award of punitive damages to the plaintiffs in this case will be violative of Article I, Section 15 of the Constitution of the State of Alabama 1901 in that the damages would be an excessive fine.

Twenty-Fifth Defense

The plaintiffs' claim for punitive damages violates the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments

of the Constitution of the United States, on the following separate and several grounds:

- (a) It is a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution to impose punitive damages, which are penal in nature, against a civil Defendant without the Plaintiff satisfying a burden of proof which is less than the "beyond a reasonable doubt" burden of proof required in criminal cases;
- (b) The procedures pursuant to which punitive damages are awarded fail to provide a reasonable limit on the amount of an award against the Defendant, which thereby violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution;
- (c) The procedures pursuant to which punitive damages are awarded fail to provide specific standards for the amount of the award of punitive damages which thereby violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution;
- (d) The procedures pursuant to which punitive damages are awarded result in the imposition of different penalties for the same or similar acts and, thus, violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution;
- (e) The procedures pursuant to which punitive damages are awarded permit the imposition of punitive damages in excess of the maximum criminal fine for the same or similar conduct, which thereby infringes the Due Process Clause of the Fifth and Fourteenth Amendments and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution;

- (f) The procedures pursuant to which punitive damages are awarded permit the imposition of excessive fines in violation of the Eighth Amendment of the United States Constitution.

Twenty-Sixth Defense

The plaintiffs' claim for punitive damages violates the Due Process Clause of Article 1, Section 6 of the Constitution of Alabama on the following separate and several grounds:

- (a) It is a violation of the Due Process Clause to impose punitive damages, which are penal in nature, upon a civil Defendant without the Plaintiff satisfying a burden of proof less than the "beyond a reasonable doubt" burden of proof required in criminal cases;
- (b) The procedures pursuant to which punitive damages are awarded fail to provide a limit on the amount of the award against the defendants;
- (c) The procedures pursuant to which punitive damages are awarded are unconstitutionally vague;
- (d) The procedures pursuant to which punitive damages are awarded fail to provide specific standards for the amount of punitive damages;
- (e) The award of punitive damages in this case would constitute deprivation of property without due process of law;
- (f) The procedures permit the award of punitive damages without satisfaction of a reduced standard of proof;
- (g) The procedures fail to provide a clear and consistent appellate standard of review of an award of punitive damages;
- (h) The procedures permit the admission of evidence relative to punitive damages in the same proceed-

ings during which liability and compensatory damages are determined;

Twenty-Seventh Defense

The award of punitive damages to the plaintiffs in this action would constitute a deprivation of property without due process of law required under the Fifth and Fourteenth Amendments of the United States Constitution.

Twenty-Eighth Defense

The procedures pursuant to which punitive damages are awarded permit the imposition of an excessive fine in violation of Article 1, Section 15 of the Constitution of Alabama.

Twenty-Ninth Defense

The defendants reserve the right to add any additional defenses that discovery would reveal to be available.

/s/ Wayne Morse

John W. Clark, Jr.

Wayne Morse

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ALABAMA and CITY OF TARRANT,
ALABAMA FIRE DEPARTMENT

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the foregoing Answer to the following attorneys of record on June 16, 1995:

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/s/ Wayne Morse
OF COUNSEL

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)
and as the Administrator of the)
Estate of ALBERTA R. JEFFERSON;)
LEON JEFFERSON AND BENJAMIN)
JEFFERSON,)
)
Plaintiffs,)
)
v.) Civil Action No.:
) CV 94-4523
CITY OF TARRANT, ALABAMA;)
CITY OF TARRANT, ALABAMA)
FIRE DEPARTMENT)
)
Defendants.)

MOTION FOR SUMMARY JUDGMENT

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IN THE CIRCUIT COURT OF
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MELVIN JEFFERSON, individually)
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CITY OF TARRANT, ALABAMA;)
CITY OF TARRANT, ALABAMA)
FIRE DEPARTMENT,)
)
Defendants.)

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The defendants, City of Tarrant, Alabama ("Tarrant City"), a municipal corporation, and City of Tarrant, Alabama Fire Department ("Tarrant Fire Department"), move the court to enter an Order granting a summary judgment in their favor and dismissing this action, pursuant to Rule 56, A.R.Civ.P. As grounds, Tarrant and the Tarrant Fire Department state that no genuine issue of material fact exists, and they are entitled to a judgment as a matter of law. In further support of this Motion, Tarrant and the Tarrant Fire Department offer the following: (a) Complaint; (b) Answer; (c) Alabama Certificate of Death for Alberta R. Jefferson; (d) the Affidavit of Kelly Bryant, Tarrant Fire Department; (e) Tarrant Fire Report for fire at Jefferson residence; (f) pages from deposition of Melvin Jefferson; (g) pages from deposition of Leon Jefferson; (h) pages from deposition of Ben Jefferson; (i) citation of legal authority.

Preliminary Statement

Alberta R. Jefferson met a tragic death in a house fire. Her husband and two of her sons have brought this lawsuit alleging that she died as a result of the wrongful conduct of Tarrant City and its Fire Department; and, that she was deprived of her constitutional rights to life and fire protective services. In addition, the plaintiffs seek damages for outrage in their individual capacities.

As a matter of law, there is no affirmative constitutional right to life or rescue services. Moreover, with respect to the wrongful death claim, the plaintiffs are unable to show that Ms. Jefferson died as a result of any conduct on the part of the defendants because the fire fighters and paramedics arrived at the scene four minutes after receiving the call. The coroner concluded that Ms. Jefferson was injured before the Tarrant Fire Department received the call. She was not alive, when checked by a paramedic, after being taken from the fire just moments after the Tarrant Fire Department arrived. Under these circumstances, the plaintiffs do not state a cognizable claim for relief. Accordingly, as a matter of law, the defendants are entitled to a judgment and dismissal of all claims.

Procedural History

This action arises out of a fire at a residence at Tarrant on December 4, 1993. The Complaint seeks compensatory and punitive damages for the wrongful death of Alberta K. Jefferson based on the following legal theories: (1) Count I, wrongful death of Ms. Jefferson allegedly caused by the "intentional, negligent, wanton, careless and unskilled actions or inactions of the defendants"; (2) Count III, pursuant to 42 U.S.C. § 1983, deprivation of life, protected by the Fourteenth Amendment to the United States Constitution; (3) Count IV, under the Fourteenth Amendment, for a denial of equal protection

and invidious discrimination in failing to rescue or to revive Alberta K. Jefferson based on race. In addition, in their individual capacities, the plaintiffs seek compensatory and punitive damages for outrage in Count II.

The Complaint alleges factually that on December 4, 1993, the subject residence "became engulfed in flames"; that the residence was within Tarrant and the jurisdiction of the Tarrant Fire Department; that the decedent, Alberta K. Jefferson, was a black woman and within the residence on that date; that the decedent was in a first floor bedroom when members of the Tarrant Fire Department arrived at the scene. Further, plaintiffs aver that Tarrant and Tarrant Fire Department employees wrongfully "refused to attempt any rescue of the decedent" and "refused to attempt to revive the decedent." According to the Complaint:

The death of Alberta K. Jefferson was caused by the selective denial of fire protection to disfavored minorities, including citizens of the City of Tarrant. This selective denial of fire protection arose out of a pattern and practice of invidious discrimination by the City of Tarrant, Alabama Fire Department.

In their Answer, the defendants plead the following defenses: (a) the plaintiffs fail to state a claim for relief under the United States Constitution or 42 U.S.C. § 1983; (b) there is no constitutional right to be rescued by the government or, in this instance, Tarrant and the Tarrant Fire Department; (c) denial of a breach of duty under Alabama tort law; (d) lack of proximate cause; (e) contributory negligence; (f) failure to state a claim for outrage; (g) general denial; (h) recovery of punitive damages would be violative of constitutional safeguards.

Narrative Summary of Undisputed Facts

1. Ms. Alberta K. Jefferson died on December 4, 1993 at 6017 58th Street North, Tarrant City, Alabama as a result of smoke inhalation at her residence; she received her fatal injury at approximately 9:40 p.m. and was pronounced dead at 9 50 p.m. *See* Exhibit A, Alabama Certificate of Death for Alberta K. Jefferson (completed by Gary T. Simmons, M.D., Associate Chief Coroner and Medical Examiner).

2. Ms. Jefferson's residence was wood frame, one-story, under 3,000 square feet and had no building alarm system. *See* Exhibit B1, Tarrant Fire Department Report.

3. The Tarrant Fire Department received a call about the Jefferson residence being in flames at 9:45 p.m.; its personnel arrived at the Jefferson residence at 9:49 p.m. *See* Exhibit B, *supra*; *see also* Exhibit C, Depo. Phillip Bennett, Tarrant Fireman and Paramedic, pp. 38-41, 51.

Applicable Authority and Analysis

A. Summary Judgment Standard

Under Rule 56, A.R.Civ.P., summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Altadena Valley Golf & Country Club v. Blue Cross and Blue Shield of Alabama*, 644 So.2d 913, 915 (Ala. 1994). In order to defeat a defendant's properly supported summary judgment motion, the plaintiff must present "substantial evidence," i.e., "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." *Id.* Once the movant makes a prima facie showing that no genuine issue of material fact exists, the burden shifts to the nonmovant to show "substantial evidence" in support of his or her position. *Id.*

B. The plaintiffs fail to state a claim for relief under the Fourteenth Amendment to the United States Constitution.

Under 42 U.S.C. § 1983, damages are sought in Count III for the deprivation of Ms. Jefferson's "right to life, as protected by the Fourteenth Amendment." In Count IV, the plaintiffs seek damages for a "denial of equal protection of the laws to Alberta K. Jefferson, as protected by the Fourteenth Amendment." Although the law applicable to each Count overlaps, each claim will be analyzed separately.

Section 1983 itself creates no substantive rights; it merely provides a remedy for deprivation of federal rights established elsewhere. *Wideman v. Shallowford Community Hospital, Inc.*, 826 F.2d 1030, 1032 (11th Cir. 1987). To establish the liability of a local government entity under § 1983, a plaintiff must establish three elements: (1) that he suffered a deprivation of rights, privileges or immunities secured by the Constitution and laws of the United States; (2) that the act or omission causing the deprivation was committed by a person acting under color of law; and (3) that the constitutional deprivation resulted from a custom, policy or practice of the municipality. *Id.* (citing *Monell v. Dept. of Social Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037 (1978)). "[P]roof of a single, isolated incident of unconstitutional activity generally is not sufficient to impose municipal liability under *Monell*." *Id.*

1. Due process claims.

Although pleaded generally, Count III appears to assert that Tarrant and the Tarrant Fire Department deprived Ms. Jefferson of her life, without due process of law, in violation of the Fourteenth Amendment, because their employees failed to rescue and to revive her. *See* Complaint, paragraph 36. The Due Process Clause provides that "[n]o State shall . . . deprive any person of life,

liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998 (1989), the Supreme Court stated:

The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security . . .

Consistent with these principles, our cases have recognized that the Due Process Clause generally confers no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.

DeShaney, 489 U.S. at 195-96, 109 S.Ct. at 1003.

There are exceptions to this rule. Liability may attach where the government takes the person into custody and holds him there against his will. *DeShaney*, 489 U.S. at 199, 109 S.Ct. at 1005; see also *Wright v. Bailey*, 611 So.2d 300 (Ala. 1992) (holding that deputy sheriffs were not liable in § 1983 action for alleged due process violation for failing to arrest intoxicated driver absent custodial relationship with motorist or intoxicated driver). For an affirmative duty requiring state protection to exist, there must be a "special relationship," which arises when the state so limits the victim's liberty that he is unable to care for himself. *DeShaney*, 489 U.S. at 200, 109 S.Ct. at 1005; *Wright*, 611 So.2d at 305.

"Where the state merely fails to protect an individual, and no special relationship or special danger exists, the failure may be actionable under a state common law theory, but not under the Due Process Clause." *Wright*, 611 So.2d at 305. Therefore, under *DeShaney* and *Wright*, even if one assumes that employees of Tarrant and the

Tarrant Fire Department were negligent in failing to revive and to resuscitate Ms. Jefferson, "mere negligence is not enough to implicate the Due Process Clause." *Id.* For Ms. Jefferson's personal representative to maintain a § 1983 action against Tarrant or the Tarrant Fire Department, his evidence must establish either that Tarrant or the Tarrant Fire Department acted affirmatively to deprive Ms. Jefferson of her life or that, by virtue of a special relationship or special danger, Tarrant and the Tarrant Fire Department had a constitutional duty to protect Ms. Jefferson from a residential fire. See *id.* The Due Process Clause of the Fourteenth Amendment is not implicated because Ms. Jefferson was not incarcerated or institutionalized; therefore, summary judgment is proper. *W. L. O. v. Smith*, 585 So.2d 22, 25 (Ala. 1991).

"There is no constitutional right to be rescued by the government, and inept rescue is not a cognizable theory for due process liability under § 1983." *Culver-Union Township Ambulance Service v. Steindler*, 629 N.E.2d 1231, 1234 (Ind. 1994) (citing *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983), cert. den'd, 465 U.S. 1049, 104 S.Ct. 1325 (1984)). In *Steindler*, the plaintiff sought damages under § 1983 for violations of her decedent's constitutional rights for her decedent's death. Personnel from the Culver-Union Township Ambulance Service responded to an emergency call and provided treatment for the decedent's heart attack. The Supreme Court of Indiana held that the trial court correctly granted the defendant's motion for judgment on the pleadings. The court noted that the decedent had not been placed in custody by the government. Citizens do not "enjoy a right to protection of life under the 14th Amendment." *Steindler*, 629 N.E. 2d at 1235. "The 14th Amendment does not require government to provide rescue services." *Id.*

The Seventh Circuit reached the same result earlier. In *Jackson v. Byrne*, 738 F.2d 1443 (7th Cir. 1984), the parents of two children who died in a fire brought a § 1983 action for deprivation of rights guaranteed under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution against the City of Chicago Fire Department and others. The lawsuit arose out of an incident which occurred while the fire fighters were on strike. Four fire fighters assisted a dispatched crew in extinguishing the blaze, but despite their efforts the children lost their lives. In holding that the children had no positive entitlement to be rescued from the fire, the court discussed the general law regarding rescues and constitutional rights.

This court has repeatedly stated that plaintiffs who have suffered tortious injury are not entitled to Section 1983 relief merely because the defendant is a government official Section 1983 imposes liability only for violation of rights secured by the Constitution or federal law Accordingly, the starting point in an analysis of a Section 1983 claim is the isolation of the specific federal right that plaintiff claims defendant violated when acting under color of state law.

Appellants claim that the facts in this case implicate the Fourteenth Amendment's protection against deprivation of life or property without due process, but that position is untenable. Although there were deaths in this case, the state did not, within the meaning of the Fourteenth Amendment, "deprive" plaintiffs' decedents of life. The fire killed Santana and Tommie Jackson, government officials did not. Our analysis would no doubt be different if government officials set the fire or placed forces in motion which ignited the fire that claimed the lives of the Jackson children.

Appellants respond with a second theory under which the city deprived Santana and Tommie Jackson of life. They contend that even if government officials did not put a match to the North Ridgeway residences, the city did fail adequately to protect plaintiffs' decedents from a fire of independent origins. Hence the district court, appellants maintain, incorrectly rendered summary judgment because a trial could have rendered summary judgment because a trial could have established a causal connection between the omission and the deaths. Appellants' argument fails to persuade us. Not every death that results from the state's failure to act is a "depriv[ation]" under the Fourteenth Amendment. Before an omission that leads to a death is actionable under the Fourteenth Amendment and Section 1983, the Constitution must recognize an underlying duty on the part of the state to act.

We have elsewhere stated that nothing in the Constitution requires governmental units to act when members of the general public are imperiled, *see Beard v. O'Neal*, 728 F.2d 894 (7th Cir. 1984); *Jackson, supra*, and we need only briefly summarize our position here. In our opinion, "the Constitution is a charter of negative liberties; it tells the [government] to leave people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order." *O'Neal, supra*, at 899, quoting *Bowers, supra*, at 618. Thus, when the Chicago fire fighters carried out their strike threat and left the city with a fraction of its former protective work force, they did not omit to perform a duty required of them by the Constitution. The Constitution creates no positive entitlement to fire protection.

Jackson, 738 F.2d at 1445-46; see also *Wideman*, 826 F.2d at 1032 (holding that there is "no general right based upon either the Constitution or federal statutes, to the provision of medical treatment and services by a state or municipality.")

Because Ms. Jefferson was not in the custody of Tarrant and the Tarrant Fire Department, no special relationship arose. Despite the tragedy of her death, Ms. Jefferson had no constitutional right to life or fire protection. More importantly, the fire killed Ms. Jefferson, not the Tarrant Fire Department. Accordingly, her personal representatives have no cognizable claim under § 1983 for violations of federal statutes or constitutional provisions. Tarrant and the Tarrant Fire Department are entitled to a judgment as a matter of law and a dismissal.

2. Equal protection claims .

Count IV of the Complaint seeks damages for denial of equal protection of the laws. Specifically, the Complaint alleges that the "actions and inactions" of Tarrant and the Tarrant Fire Department "were part of a pattern and practice and custom of denying protective services to disfavored minorities."

The Fourteenth Amendment's Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Only intentional or deliberate discrimination, not mere negligent conduct, violates equal protection. *Rickett v. Jones*, 901 F.2d 1058, 1060-61 (11th Cir. 1990); *Jackson*, 715 F.2d at 1203. Such discrimination is not alleged in the Complaint. The Complaint does mention intentional acts in Count IV; however, it does so in connection with an explanation of why the personal representative says that the estate of Ms. Jefferson is entitled to punitive damages. No allegation of intentional or deliberate discrimination is made in the

Complaint. Therefore, no claim for relief for violation of the Equal Protection Clause is alleged; Tarrant and the Tarrant Fire Department are entitled to a judgment as a matter of law. See *Jackson*, 715 F.2d at 1203 (holding that failure to allege deliberate discrimination entitled defendants to dismissal for failure to state a claim under Rule 12(b)(6)).

Several federal circuit courts have held that if a plaintiff, such as Ms. Jefferson's personal representative, has a claim, it is under the Due Process Clause and not the Equal Protection Clause. According to the Eleventh Circuit: "If such a right [under either the Constitution or federal statutes to medical treatment and services by a municipality] exists at all, it *must* derive from the Fourteenth Amendment's Due Process Clause, which forbids a state to deprive anyone of life, liberty or property without due process of law." *Wideman*, 826 F.2d at 1032-33. Similarly, the Seventh Circuit has held: "If the plaintiffs have a claim it is under the Fourteenth Amendment's Due Process Clause, which forbids the state to deprive anyone of life, liberty, or property without due process of law." *Jackson*, 715 F.2d at 1203.

The Seventh Circuit has acknowledged in discussion that it is possible to allege a claim for denial of equal protection in the context presented. *Jackson*, 715 F.2d at 1203 ("If the defendants had withheld protection from the plaintiffs' decedents because they were blacks or members of some other vulnerable minority - if the defendants were discriminatory in a vicious or irrational fashion there would be an equal protection issue.") However, no such allegation is made here.

More importantly, the plaintiffs are unable as a matter of law to prove an equal protection violation. To establish an equal protection clause violation, a plaintiff must demonstrate that a challenged action was motivated by an intent to discriminate. *Elston v. Talladega County Board*

of Education, 997 F.2d 1394, 1406 (11th Cir. 1993). "Discriminatory intent may be established by evidence of such factors as substantial disparate impact, a history of discriminatory official actions, procedural and substantive departures from the norms generally followed by the decision-maker, and discriminatory statements in the legislative or administrative history of the decision." *Id.*

Even if the Complaint stated a claim for relief for violation of the Equal Protection Clause, the plaintiffs would be unable to produce evidence of such a claim. At his deposition, the decedent's husband, plaintiff Ben Jefferson, testified:

Q. Is there anything that makes you think that they didn't come out there that quickly just because you were black?

A. I can't tell you that either. I know one thing, they took their time coming out there. And I didn't have any help from either one of them to help me get my wife out.

Q. Do you have any information or any knowledge or any facts to show that they denied services to your or your family because that you were black?

A. No, they didn't. That is all I can say. They didn't help me get my wife out, because I was standing here as close as from me to you when I asked him.

Q. There are other black families than you folks that live there in Tarrant, isn't there?

A. Yes.

Q. To your knowledge, have any of them had any problems of any type with the Tarrant Fire Department?

A. Not that I know of, because ain't nobody else's house got burned up as far as I know anything about.

Q. Have any of the others needed emergency services of any type where they might have called the Tarrant Fire Department?

A. Not that I know of.

Q. You don't know of anything that would indicate to you that fire protection was denied to you or any other black families out in Tarrant just because y'all were black and not white?

A. I don't know.

See Exhibit D, Depo. Ben Jefferson, pp. 61-63.

Ms. Jefferson's son and personal representative, Melvin Jefferson, also testified as to this issue:

Q. All right, sir. Now, do you have any information from any source that the City of Tarrant denied services or protection to any minority groups?

A. To the best of my knowledge as far as I can remember - to any minority groups?

Q. Yes, sir. Blacks, Hispanics, anyone other than, I guess, white male, is a minority group.

A. I don't. I don't. I know one other incident where a fire occurred in our neighborhood.

Q. What was that incident?

A. There was a fire at Ms. Pugh's house. It is on the next block, around the corner on the next block from my mother's house.

Q. Do you know how long ago it was that a fire occurred?

A. I can't remember.

Q. Just to get some kind of frame, five years, ten years, twenty?

A. I can't remember. Five. I can't remember.

Q. Ms. Pugh, would that be the mother of the gentleman you talked to out there about this?

A. The grandmother.

Q. What was there about that fire that led you to the conclusion that the Fire Department wasn't providing services to her?

A. The house was destroyed.

Q. Was there any indication that you got from her that the Fire Department was slow in getting there or did something improperly in putting the fire out?

A. I never talked to Ms. Pugh directly.

Q. Who did you talk to?

A. I heard it from talking with my brother.

Q. We talked about your brother. Is that your brother that is here in the room with us now, Leon Jefferson?

A. Yes.

Q. What did he tell you?

A. We had conversations about the fire at Ms. Pugh's house.

Q. All right. What did he tell you about it, specifics?

A. Her house was destroyed.

Q. All right. Did he tell you that the Fire Department was called and they did not come out there?

A. Her house was destroyed, I mean it - they were slow in getting there, too. The Fire Department was slow in getting to Ms. Pugh's house, also.

Q. Were any criticisms of the Fire Department given to you by your brother or anyone else on the Pugh fire other than the fact they were slow in getting there?

A. Not that - - other people saying it? Not that I can recall.

Q. Do you yourself have any other facts that indicate to you that the City of Tarrant Fire Department has been denying fire protection to you or anyone else in Tarrant because they are a minority group?

A. No, other than the incidents that described that - - these things that we talked about.

Q. The incident that occurred to your mother and the incident that occurred to Ms. Pugh?

A. As best that I can remember.

Q. All right. Do you have any other information yourself that the City of Tarrant in any way refused to provide services or deny services to any minority groups other than what you have told me about?

A. The best I can remember, no.

See Exhibit E, Depo. Melvin Jefferson, pp. 41-45.

Another plaintiff, Leon Jefferson, provided the following testimony:

Q. Now, have you talked with anybody or do you have any information that the City of Tarrant out there denied fire protection to people out there because they were minorities or blacks?

A. Well, Tarrant, from the Pugh incident that occurred maybe in '90 or '91. You have that in your interrogatory questions, Ms. Pugh, the year the fire started and everything. She stated the fact that they were somewhat slow about getting to her house when her house caught on fire. They were very slow. They were very sluggish. Said she could have put out the fire herself probably at the time they got out there, you know, and she would probably tell you the same.

Q. Any other incidents that you are aware of that anybody has told you about or that you personally know other than the Pugh incident?

A. No, nothing other than the Pugh incident. And from that pattern the sluggishness, the slowness, from that pattern in that area, just only blacks in that area, on 58th, 59th, 57th. There is no other area that blacks are in, on that pattern, they are slow and sluggish and did not do a sufficient job.

Q. You think they are slow and sluggish because of the problem Ms. Pugh had at her house and because you think it took them a long time to get to your parents' house?

A. From that pattern, that, and then from the same pattern that occurred some four or five years later after Ms. Pugh's incident. They was very slow and very sluggish, not efficient. They didn't perform a distinguish job.

Q. All right. You talked about an incident four or five years after Ms. Pugh. Is that what you are talking about?

A. Ms. Pugh and my parents. That is what I am talking about.

Q. All right. Any other incidents other than those two incidents of which you are aware?

A. No. Q. Do you have any information that they, that the people out there just deny fire protection services to members of minority groups other than what you have told me about?

A. Other than nothing but what I told you about. That is all that I know.

Q. All right. And any statements that you made that they just don't provide fire protection to blacks or minorities based on the problems that you had at your house or our mom and dad's house -

A. Right.

Q. -- has anybody else told you of any problem they have had with the Tarrant Fire Department or the Tarrant Police Department of any type?

A. I just heard some years ago back they were slow when it come to black people, period. I just heard that maybe from some people in the area. I don't know of any names that I can recall. From the Pugh pattern to the Jefferson pattern, I found that to be kind of true.

See Exhibit F, Depo. Leon Jefferson, pp. 54-58.

Most of the testimony offered by the plaintiffs at their depositions in response to discrimination by Tarrant and the Tarrant Fire Department is not admissible evidence because it is hearsay or not a product of the witness's personal knowledge. "Evidence that is not admissible at trial can not be considered on a motion for summary judgment." *Yarbrough v. Springhill Memorial Hosp.*, 545 So.2d 32, 34 (Ala. 1989). Because the plaintiffs are unable to prove any actions by Tarrant or Tarrant Fire Department, summary judgment and dismissal are proper.

B. State Tort Law Claims

1. Wrongful Death.

In *Williams v. City of Tuscumbia*, 426 So.2d 824 (Ala. 1982), the Alabama Supreme Court recognized a claim for relief against a municipality for negligence in failing to respond immediately to a call about a house fire.

Once a city or town organizes and provides for a fire department, what is the duty owed to the citizens of the city or town? Tuscumbia contends that a duty imposed upon a municipal fire department is owed to the general public - not to an individual. Does this mean that the whole town has to be on fire before the fire department responds to a call? It may be true that a certain fire in the city would have priority over another fire. For example, if a multi-story building was on fire and in it a number of people were stranded and about to suffer imminent death from the fire, it could hardly be questioned that the fire inside the multi-story building would have priority over a fire in a dwelling where only property damage would be suffered.

We opine that in this case a duty was imposed on the Tuscumbia Fire Department to respond immediately to the call that the Williams's house was on fire. There was a special duty created to act in a skillful manner to respond to the call. We recognize the fact that firemen may act in a skillful manner to respond to the call. We recognize the fact that firemen may act with extreme skillfulness and yet be unable to get to a fire to prevent a building from burning to the ground. But, here the complaint alleges that the reason the fire department did not immediately respond was that the driver of the truck had gone home sick and had not been replaced. We opine that the fire department acted

unskillfully by not having a back-up driver who could have immediately taken the place of the sick driver, § 11-47-190, Code of Alabama 1975. In other words, the fire department lacked proficiency. Cf. *City of Birmingham v. Thompson*, 404 So.2d 589 (Ala. 1981).

Williams, 426 So.2d at 825-26.

In the case presented, the plaintiffs are unable to show that Tarrant and the Tarrant Fire Department acted tortiously, i.e., breached a duty to respond immediately to the call that the Jefferson residence was on fire, or failed to act skillfully in responding to the call. The depositions and death certificate reveal the following chronology of events on December 4, 1993:

- 9:40 p.m. — Ms. Jefferson receives fatal injury.
- 9:45 p.m. — Tarrant Fire Department receives call that Jefferson residence is on fire.
- 9:49 p.m. — Tarrant Fire Department arrives at Jefferson residence.
- 9:50 p.m. — Ms. Jefferson is pronounced dead after being pulled from the fire; her pulse and airways and pupils are checked.

See Exhibits A and B1, *supra*; see also Exhibit C, Deposition of Phillip Bennett, pp. 38-41. There is no evidence of any delay here as there was in *Williams*. The Tarrant Fire Report indicates that fire fighters and paramedics arrived at the scene four minutes after receiving the call. See Exhibit C, Depo. Bennett, p. 51. This fact has not been disputed.

As a matter of law, the circumstances presented do not give rise to a cognizable claim. In *Lane v. Town of Columbia*, 474 So.2d 1073 (Ala. 1985), the Alabama Supreme

Court upheld a summary judgment in favor of a municipality in a case in which the EMT crew arrived seventeen minutes after receiving the call. Like the plaintiffs in the case sub judice, the plaintiff in *Lane* sued as personal representative for the wrongful death of his intestate and individually for the tort of outrage. The court stated: "We are unable to perceive these facts as furnishing a reasonable inference supporting any cognizable claim against any of the defendants in favor of either of the plaintiffs." *Lane*, 474 So.2d at 1075.

In comparison, Tarrant fire fighters arrived in four minutes at the Jefferson residence. Based on *Lane*, the plaintiffs in the case presented have no cognizable claim for wrongful death or outrage. That Tarrant and the Tarrant Fire Department are entitled to a judgment as a matter of law is underscored when one considers that *Lane* was decided under the "scintilla" rule. § 12-21-12 Ala. Code; *Morris v. Birmingham Southern R. Co.*, 545 So.2d 34 (Ala. 1989). The *Jefferson* plaintiffs lack not only "substantial" evidence but a "scintilla" of evidence as well.

In addition, the evidence indicates that Ms. Jefferson received fatal injuries before the Tarrant Fire Department received the call. The death certificate indicates that Ms. Jefferson was injured at 9:40 p.m. A death certificate "is prima facie evidence of facts therein stated." *Nelson v. Lee*, 249 Ala. 549, 556, 32 So.2d 22 (1947). Neither of Ms. Jefferson's sons, both of whom were at the scene, knows whether Ms. Jefferson was living or dead when she was taken out of the house. See Exhibit F, Depo. Leon Jefferson, p. 37; see also Exhibit E, Depo. Melvin Jefferson, p. 41. Because the plaintiffs are unable to rebut the time of Ms. Jefferson's death, the time stated by Dr. Simmons in the death certificate must be deemed conclusive. *Liberty Nat'l Life Ins. Co. v. Reid*, 276 Ala. 25, 34, 158 So.2d 667 (1963).

In Alabama, a wrongful death action "comes into being only on death from wrongful act." *Geohagan v. General Motors Corp.*, 291 Ala. 167, 171, 279 So.2d 436 (1973). In this instance, the plaintiffs are unable to show that any breach of duty or any unskillful act contributed to cause Ms. Jefferson's death. Inasmuch as Ms. Jefferson was fatally injured before the Tarrant Fire Department even received the call, no action or inaction on the part of the fire fighters could have caused her death. Tarrant and the Tarrant Fire Department are entitled to summary judgment.

2. Outrage

Although pleaded in generalities, Count II of the Complaint appears to assert damages for outrage for the plaintiffs in their individual capacities. The tort of outrage requires extreme and outrageous conduct by a person who intentionally or recklessly causes severe emotional distress to another. *Nipper v. Variety Wholesalers, Inc.*, 638 So.2d 778, 780 (Ala. 1994). There must be evidence to show that the defendant's conduct is so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society. *Id.*

In *Lane*, the Alabama Supreme Court upheld a summary judgment for the defendant municipality under similar facts and determined there was no outrageous conduct as a matter of law. *Lane*, 474 So.2d at 1075. Analogously, Alabama does not recognize negligent infliction of emotional distress. *Gideon v. Norfolk Southern Corp.*, 633 So.2d 453 (Ala. 1994). Likewise, Alabama does not allow bystander recovery. *Id.*; *Slovensky v. Birmingham News Co. Inc.*, 358 So.2d 474, 477 (Ala. Civ. App. 1978) ("Concerning mental anxiety or distress, the law in Ala-

bama does not permit recovery for mental distress because of a wrong to another.")

The plaintiffs are unable to produce evidence that Tarrant Fire Fighters "intentionally" or "recklessly" caused them severe emotional distress or that any conduct on their part was extreme and outrageous. Naturally, the plaintiffs, the deceased's husband and sons, would be emotionally wrought over her death. But the facts presented - that the Tarrant fire fighters did not administer C.P.R. to Ms. Jefferson after checking her pulse and heartbeat and determined that she was not alive - do not give rise to a cognizable claim for outrage. *Lane*, 474 So.2d at 1075.

3. Statutory Notice

§ 11-47-192 Ala. Code provides:

No recovery shall be had against any city or town on a claim for personal injury received, unless a sworn statement be filed with the clerk by the party injured or his personal representative in case of his death stating substantially the manner in which the injury was received, the day and time and the place where the accident occurred and the damages claimed.

Itemization of damages is unnecessary in a wrongful death case. *Town of Athens v. Miller*, 190 Ala. 82, 66 So.2d 702 (1914). However, in a lawsuit for personal injuries, the claimant is required to state the dollar amount of damages sought in his statutory notice preceding the initiation of the lawsuit. *City of Montgomery v. Weldon*, 280 Ala. 463, 466, 195 So. 110 (1967) (holding that notice did not satisfy statutory requirement because plaintiff "had not stated the amount of damages claimed.") A plaintiff's recovery is limited to the amount claimed in the notice filed with the municipality. *Perrine v. Southern Bitulithic Co.*, 190 Ala. 96, 66 So. 705, 706 (1914).

The notices filed by the plaintiffs, Ben Jefferson¹, Melvin Jefferson², and Leon Jefferson³ are defective. See Exhibit C5,

¹Please be advised this letter is to put you on notice that as the husband of Alberta R. Jefferson, I am claiming personal injury, mental anguish, conduct 90 outrageous that it surpasses the normal, negligence, wantonness and recklessness in the death of Alberta R. Jefferson, which was caused by the Fire Department of Tarrant when they responded to a fire at her home on December 4, 1993. I witnessed the actions of the Fire Department of Tarrant and begged for their assistance in bringing my wife out of the house, which they refused to give. I hereby make demand for damages on behalf of the Estate in the clause of her wrongful death caused by the Fire Department of Tarrant.

²Please be advised this letter is to put you on notice that as Executor of the Estate of Alberta R. Jefferson I am claiming personal injury, mental anguish, conduct 90 outrageous that it surpasses the normal, negligence, wantonness and recklessness in the death of Alberta R. Jefferson, which was caused by the Fire Department of Tarrant when they responded to a fire at her home on December 4, 1993. I hereby make demand for damages on behalf of the Estate in the clause of her wrongful death caused by the Fire Department of Tarrant.

Please be advised this letter is to put you on notice that as the son of Alberta R. Jefferson, I am claiming personal injury, mental anguish, conduct so outrageous that it surpassed the normal, negligence, wantonness and recklessness in the death of Alberta R. Jefferson, which was caused by the Fire Department of Tarrant when they responded to a fire at her home on December 4, 1993. I witnessed the actions of the Fire Department of Tarrant and begged for their assistance in bringing my mother out of the house, which they refused to give. I hereby make demand for damages on behalf of the Estate in the clause of her wrongful death caused by the Fire Department of Tarrant.

³Please be advised this letter is to put you on notice that as son of Alberta R. Jefferson, I am claiming personal injury, mental anguish, conduct so outrageous that it surpassed the normal, negligence, wantonness and recklessness in the death of Alberta R. Jefferson, which was caused by the Fire Department of Tarrant when they responded to a fire at her home on December 4, 1993. I witnessed the actions of the Fire Department of Tarrant and begged for their assistance in bringing my mother out of the house, which they refused to give.

Notice of Ben Jefferson; Exhibit C4, Notices of Melvin Jefferson; Exhibit C6, Notice of Leon Jefferson. Although each of the Notices may seek damages for outrage for the plaintiffs individually, none of the Notices contain a statement of the amount of damages sought.

/s/ Wayne Morse

John W. Clark, Jr.

Wayne Morse

Attorneys for CITY OF TARRANT,
ALABAMA and CITY OF TARRANT,
ALABAMA FIRE DEPARTMENT

OF COUNSEL:

CLARK & SCOTT, P.C.

3500 Blue Lake Drive, Suite 350

Birmingham, AL 35243-1907

(205) 967-9675

NOTICE OF HEARING

This Motion for Summary Judgment is set before the Honorable Drayton N. James, Circuit Court Judge, Jefferson County, on July 7, 1995 at 11:00 a.m.

I hereby make demand for damages on behalf of the Estate in the clause of her wrongful death caused by the Fire Department of Tarrant.

CERTIFICATE OF SERVICE

I hereby certify that I have hand delivered a copy of the foregoing Motion for Summary Judgment to the following attorney of record on June 24, 1995:

Dennis G. Pantazis, Esq.

1400 SouthTrust Tower

Birmingham, AL 35203

/s/ Wayne Morse

OF COUNSEL

This is a true and exact copy of the record to file with
the Jefferson County Health Department.

Panda Brinkdale
Signature of Local or Deputy Registrar Date of Issue
12-17-93

ALABAMA CERTIFICATE OF DEATH

101

1. NAME OF DECEASED ALBERTA R. JEFFERSON		2. DATE OF DEATH DECEMBER 04, 1993		3. LAST KNOWN RESIDENCE JEFFERSON	
4. CITY, TOWN, OR VILLAGE TARRANT CITY 35217		5. COUNTY TARRANT		6. SEX FEMALE	
7. RACE BLACK		8. AGE 422-34-0904		9. DATE OF BIRTH JULY 29, 1951	
10. PLACE OF BIRTH MISSISSIPPI		11. MARITAL STATUS MARRIED		12. NAME OF SPOUSE STELLA L. JEFFERSON	
13. NAME OF DECEASED'S MOTHER STELLA L. JEFFERSON		14. NAME OF DECEASED'S FATHER STELLA L. JEFFERSON		15. NAME OF DECEASED'S SPOUSE STELLA L. JEFFERSON	
16. NAME OF DECEASED'S SPOUSE STELLA L. JEFFERSON		17. NAME OF DECEASED'S SPOUSE STELLA L. JEFFERSON		18. NAME OF DECEASED'S SPOUSE STELLA L. JEFFERSON	
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MEDICAL CERTIFICATION

1. CAUSE OF DEATH Stroke inhalation.		2. DATE OF DEATH DECEMBER 04, 1993	
3. PLACE OF DEATH Residence		4. NAME OF DECEASED ALBERTA R. JEFFERSON	
5. NAME OF DECEASED'S SPOUSE STELLA L. JEFFERSON		6. NAME OF DECEASED'S SPOUSE STELLA L. JEFFERSON	
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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)
and as the Administrator of the)
Estate of ALBERTA K. JEFFERSON;)
LEON JEFFERSON and BENJAMIN)
JEFFERSON,)

Plaintiffs,

vs.

CITY OF TARRANT, ALABAMA;
CITY OF TARRANT, ALABAMA
FIRE DEPARTMENT,

Defendants.

AFFIDAVIT OF STEPHEN WAYNE HALL

My name is Stephen Wayne Hall. I am a Lieutenant with the Fire Department for the City of Tarrant, Alabama, a defendant in the above-styled lawsuit. I am over nineteen years of age and competent to testify to the matters contained in this Affidavit, which I understand will be used in support of summary judgment for the City of Tarrant, Alabama, and the Fire Department for the City of Tarrant, Alabama.

1. Among other duties at the Tarrant Fire Department, it is my responsibility to maintain records and documents pertaining to fire protection services.

2. The Tarrant Fire Department maintains records and documents in the regular course of business.

3. It is part of the regular course of business for the Tarrant Fire Department to maintain records and documents.

4. The Tarrant Fire Department maintains the following records and documents in the regular course of business:

- Report on fire at 6017 58th Street North, Tarrant, Alabama on December 4, 1993. (Exhibit 1).
- Alabama Uniform Incident/Offense Report pertaining to fire at Jefferson residence and investigation into Ms. Jefferson's death. (Exhibit 2).
- Notice of claim for damages for death of Alberta K. Jefferson filed by Melvin Jefferson as personal representative of her estate. (Exhibit 3).
- Notice of Claim for damages filed by Melvin Jefferson in his individual capacity. (Exhibit 4).
- Notice of Claim for damages filed by Ben Jefferson in his individual capacity. (Exhibit 5).
- Notice of Claim for damages filed by Leon Jefferson in his individual capacity. (Exhibit 6).

/s/ Stephen Wayne Hall
Stephen Wayne Hall

STATE OF ALABAMA)
JEFFERSON COUNTY)

Before me, the undersigned, a Notary Public in and for said County and State, did personally appear Stephen Wayne Hall, who being first duly sworn, deposes and says that he/she has read the foregoing, that the contents contained herein are true and correct and that he/she executes the same voluntarily and of his/her own free will.

6-23-95
DATE

/s/ Allen Wlepin Jr.
NOTARY PUBLIC
My Commission Expire: 9-10-95

ALARM RECEIVED BY: Phone (✓) Radio () 3. Box () 4. Aerial ()
LOCATION OF FIRE 6017 58th St No. Street Room of Apt. Floor
OCCUPANT'S NAME Alberta Jefferson
OWNER'S NAME
INSURANCE COMPANY
RESPONDING EQUIPMENT 1. 1 2. 1 3. 1 4. 1
II. TYPE OF NON-FIRE: 1. Water Pipe-Service () 3. False Alarm-Mistaken Citizen ()
2. False Alarm-Falicious () 4. Fire-Service ()
III. TYPE OF FIRE: (✓) 1. Fire in Structure () 2. Fire not in Structure () 3. Fire in Mobil Unit.
IV. NON-OCCUPANT CODE: (Circle appropriate no.)
01 Motor Vehicle 07 Fence 13 Rubbish
02 Truck w/Hazardous Material 08 Fire Works 14 Portable Vessel w/ Flare
03 Tank Truck 09 Grass or Brush 15 Railroad Rolling Stock
04 Aircraft Fire 10 Lumber (not lumber yard) 16 Roofing Kettle
05 Boat 11 Barn or shed 17 Tax Pot
06 Bridge 12 Garages 18 Unclassified
V. FIRE IN STRUCTURE: (How Occupied) Dwelling
VI. FIRE FACTORS:
() A. Building Construction () B. Building Height () C. Building Area
1. Fire Resistant 1. One Story 1. Under 3,000 Sq. Ft.
2. Heavy Timber 2. 2-3 Stories 2. 3,000 - 5,000 Sq. Ft.
3. Non-Combustible 3. 4-5 Stories 3. 5,000 - 10,000 Sq. Ft.
4. Ordinary Joisted 4. 5-10 Stories 4. Over 10,000 Sq. Ft.
5. Wood Frame 5. Over 10 Stories
VII. SPREADING ALARM SYSTEM: () 1. Operated () 2. Not operated (✓) 3. None on Premises
VIII. EXTENT OF FIRE: () 1. Confined to place of origin () 3. Extended to adjacent prop
(✓) 2. Confined to building () 4. Extended beyond adjacent p
IX. FIRE DEVICES: (Circle all appropriate factors)
() Available and used by Residents 3. Used by Fire Department
() Available-not used 4. None Available
X. FIRE-EXTINGUISHING EQUIPMENT: (Circle all appropriate factors)
01 Automatic Sprinklers 05 Foam System 09 Hand Pump 13 Heavy Stream Appar
02 CO2 System 06 Private Extinguisher 10 Receptor
03 Deluge System 07 Standpipes 11 1 1/2" Hose
04 Dry Chemical System 08 Aerial Extinguisher 12 1 1/2" and/or 1" Hose
XI. FIRE DEVICES: (Circle all appropriate factors)
1. Controlled Fire 3. No Heads Opened 5. 1-5 Heads 7. 11-20 Heads
2. Did not Control Fire 4. None in area involved 6. 6-10 Heads 8. Over 20 Heads
XII. DAMAGE EXTENT: (Circle all appropriate factors)
1. NO DAMAGE 1. None 2. Small 3. Moderate 4. Considerable
2. NO DAMAGE 1. None 2. Small 3. Moderate 4. Considerable
XIII. WEATHER CONDITIONS: (Circle all appropriate factors)
1. Clear 2. Rain 3. Ice & Snow 4. Wind & Partly 5. Temp. above 65 degrees
6. Temp. below 65 degrees
XIV. PERSONS INJURED OR KILLED:
Number of Persons Injured Number of Persons Killed
Persons Injured () Civilians () Firefighters () Civilians () Firefighters ()
XV. SALVAGE & ALARM DATA (check one)
Salvage work continued () Alarm investigation called () Police called (✓)

OFFICER IN COMMAND REPORTED

Name Bruant Rank Lt Company B
 Signed: _____
 Fire Chief

Person Reporting Fire: W. J. J. J. J. J.

Witnesses to fire before arrival of Fire Department: Quangants and
maileous

7. Detailed description of situation on arrival: Rear half of house
fully engulfed in flames

Detailed description of action taken by Fire Department: Put down supply line from hydrant at 59 St & Wilson. Extinguished fire with 1 1/2" line.

7. Cause of Fire:

7. Off duty personnel called: Yes

II. Mutual Aid Units responding:

... Detailed description of salvage operations:

ALABAMA UNIFORM INCIDENT/OFFENSE REPORT

PORT INS: City of
TALLANT

1000012049926 TARRANT 743 L 71908 93121865

6017 50th St. No. TARRANT AL
6017 50th St. No. TARRANT AL. CCD

DEATH INVESTIGATION

#13

7204913 21.35
7204913 21.45

RECEIVED
MAY 28 1994
KEY RECORDS

TYPE OR PRINT IN BLACK INK

1200 Grand Boulevard
Birmingham, AL 35214

January 18, 1944

The City of Tarrant
Clerk of the City of Tarrant
Tarrant, Alabama 352

RE: The Estate of Alberta R. Jefferson
Wrongful Death occurring on December 4, 1993

Dear Clerk of City:

Please be advised this letter is to put you on notice that as Executor of the Estate of Alberta R. Jefferson I am claiming personal injury, mental anguish, conduct so outrageous that it surpassed the normal, negligence, wantonness and recklessness in the death of Albert R. Jefferson, which was caused by the Fire Department of Tarrant when they responded to a fire at her home on December 4, 1993. I hereby made demand for damages on behalf of the Estate in the cause of her wrongful death caused by the Fire Department of Tarrant.

Sincerely,

/s/ Melvin C. Jefferson
Melvin Jefferson
Executor of the Estate of
Alberta R. Jefferson

ALABAMA UNIFORM INCIDENT/OFFENSE REPORT SUPPLEMENT

0110181010 TARRANT 11/10/41 23 93.12.18.65

TARRANT, ALBERTA

DEATH INVESTIGATION

that it appeared smoke was coming from the ceiling and in an area toward the rear of the house where there is a wood burning stove. Gerald advised that he went to his grandparents bedroom door. However it was shut and he could not open it. Wit #2, Marzetta Pitts told them to get out. The complainant, wit #1 + wit #2 then ran out the rear door and arrived at the victim's bedroom window.

Complainant states that his grandfather was outside the house and was reaching back in the window trying to get the victim. Gerald advised the victim had no legs and had apparently fallen off the bed onto the floor.

Wit #4, Leola Jefferson + his son Wit #5, Alvin Jefferson arrived at the house and was able to get the victim out through the window. However she was already dead.

EVIDENCE TECH Brenda Wilkinson and Brenda Jay Glass were called to the scene. No other witnesses.

STATE BARBARA 11

TYPE OR PRINT IN BLACK INK ONLY

Sworn to and subscribed before me this 18th day of
January, 1994.

/s/ Linda B. Laiser
Notary Public

My commission expires 02 Dec 95.

cc: The City of Tarrant Fire Department

February 10, 1994

The City of Tarrant
Clerk of the City of Tarrant
1604 Pinson Valley Parkway
Tarrant, Alabama 35217

Re: Alberta R. Jefferson's
Wrongful Death occurring on December 4, 1993

Dear Clerk of Court:

Please be advised this letter is to put you on notice that as the son of Alberta R. Jefferson, I am claiming personal injury, mental anguish, conduct so outrageous that it surpasses the normal, negligence, wantonness and recklessness in the death of Albert R. Jefferson, which was caused by the Fire Department of Tarrant when they responded to a fire at her home on December 4, 1993. I witnessed the actions of the Fire Department of Tarrant and begged for their assistance in bringing my mother out of the house, which they refused to give. I hereby made demand for damages in the cause of her wrongful death caused by the Fire Department of Tarrant.

Sincerely

/s/ Melvin C. Jefferson
Melvin Jefferson

February 10, 1994

The City of Tarrant
Clerk of the City of Tarrant
1604 Pinson Valley Parkway
Tarrant, Alabama 35217

Re: Alberta R. Jefferson's
Wrongful Death occurring on December 4, 1993

Dear Clerk of Court:

Please be advised this letter is to put you on notice that as the husband of Alberta R. Jefferson, I am claiming personal injury, mental anguish, conduct so outrageous that it surpasses the normal, negligence, wantonness and recklessness in the death of Albert R. Jefferson, which was caused by the Fire Department of Tarrant when they responded to a fire at her home on December 4, 1993. I witnessed the actions of the Fire Department of Tarrant and begged for their assistance in bringing my wife out of the house, which they refused to give. I hereby made demand for damages in the cause of her wrongful death caused by the Fire Department of Tarrant.

Sincerely,

/s/ Ben Jefferson
Ben Jefferson

Sworn to and subscribed before me this 11 day of February, 1994.

/s/ Robert D. Sklon
Notary Public

My commission expires on 3/18/95.

February 10, 1994

The City of Tarrant
Clerk of the City of Tarrant
1604 Pinson Valley Parkway
Tarrant, Alabama 35217

Re: Alberta R. Jefferson's
Wrongful Death occurring on December 4, 1993

Dear Clerk of Court:

Please be advised this letter is to put you on notice that as the son of Alberta R. Jefferson, I am claiming personal injury, mental anguish, conduct so outrageous that it surpasses the normal, negligence, wantonness and recklessness in the death of Albert R. Jefferson, which was caused by the Fire Department of Tarrant when they responded to a fire at her home on December 4, 1993. I witnessed the actions of the Fire Department of Tarrant and begged for their assistance in bringing my mother out of the house, which they refused to give. I hereby made demand for damages in the cause of her wrongful death caused by the Fire Department of Tarrant.

Sincerely,

/s/ Leon Jefferson
Leon Jefferson

Sworn to and subscribed before me this 11 day of February, 1994.

/s/ Robert D. Sklon
Notary Public

My commission expires on 3/18/95.

did you call him?

A. He called.

Q. Are you aware of any problems that Mr. Webb ever had at the Fire Department?

A. No.

Q. To start with, I'm talking about the Jefferson fire now, December 4th, 1993. Can you tell me — we're going to start talking about what happened that day. Can you tell me when you first became aware of the fire?

A. It was by telephone, and would have to look at the fire report to get the time.

Q. Would that be in some of these papers that you brought?

A. Yes.

Q. Why don't you pull out whatever you need. Wait a minute. Let's do this. I'm going to mark this whole thing as Plaintiff's Two.

* * *

able to say that it was 9:45 p.m.?

A. The police dispatcher record. The police dispatches us also.

Q. But how were you able to come up with that 21:45?

A. It's recorded.

Q. Where is it recorded?

A. In the police department.

Q. Is it on here, on what I've got marked as 2(a) somewhere?

A. Yes.

Q. Do you remember you hearing about the fire at 9:45, or is that just — you just know that the call came in at 9:45 because of that piece of paper?

A. Yes.

Q. When did you first hear about the fire?

A. At 9:45.

Q. So you took the call?

MR. MORSE: Why don't y'all straighten it out?

I think what he's asking you is, do you have an independent recollection. A recollection independent of the fire report.

THE WITNESS: Well, I'm sure heard the phone ring, but I'm not —

MR. MORSE: Is that what you're asking, Brian?

MR. CLARK: No. I think we've established from this document that the call came in at 9:45.

MR. MORSE: Right.

MR. CLARK: I want to know when he first heard about the fire.

A. Well, the phone rings in the fire department. And when our phone rings, if we're there, we answer it. Anyone answers it.

Q. Did you —

A. If we're not there, the police dispatcher answers it.

Q. Who answered it in this instance?

A. I cannot remember.

Q. When you say that the call came in at 9:45, what do you mean? Does that mean that your phone rang at 9:45 at the Fire Department?

A. Yes.

Q. Do you know if anybody picked that up?

A. No, I don't remember.

Q. Do you know if it went to the police dispatcher?

A. The police dispatcher can also pick up, yes.

Q. Do you know if the police dispatcher had to pick it up, or if someone from the fire department picked it up?

A. I do not remember.

Q. Okay.

A. But it can be both at times.

Q. What would happen if nobody picked up in the fire department?

A. The police dispatcher would pick it up.

Q. How long would it take the police dispatcher to pick up?

A. One or two rings.

Q. And, then, what would happen?

A. They're aware when we're not at the station.

Q. And, then, what would happen?

A. Then, she could get on the radio and dispatch us that way.

Q. She would get on the radio and call the fire department and say there's a fire —

A. Yes.

Q. — at thus and so address?

A. Yes.

Q. Do you know which procedure happened in this case?

A. We were at the station.

Q. So somebody from the —

A. Somebody from the fire department picked it up.

Q. Do you know who that was?

A. No, I do not.

Q. Well, how did you first find out that you were going to a fire that evening?

A. Whoever answered the phone said so.

Q. Do they just put down the phone and say, "Hey, we're going to a fire?"

A. Yes.

Q. Did they tell you anything about the fire?

A. No.

Q. Do you remember who told you, "We're going to a fire?"

A. No.

Q. Do you know how long it was from the time the phone rang until you knew you were going?

A. Immediately.

Q. Do you know that, or is that just the general practice and procedure?

A. Both. When the fire phone rings, everybody heads for it.

Q. There's a separate phone for the fire phone?

A. Yes, there are two fire lines. And, then, we also have "hello" phones.

Q. Right.

A. Non-emergency.

Q. If I want to call and want to talk to you, or if somebody's wife wants to call and tell their husband to pick up a loaf of bread, it's not going to be on the fire phone?

A. It should not be.

Q. Should not be?

A. Right.

Q. So there's a fire phone where you know that if that phone rings, we're going?

A. It's an emergency.

Q. It's an emergency?

A. Or possibly.

Q. Possibly an emergency?

A. It could be something like a wrong number.

Q. A wrong number or something like that?

A. Yes.

Q. So the fire phone rang, and how did you know — did you hear the fire phone ring that night?

A. Yes.

Q. When did you first know where you were going?

A. Usually, whoever answers the phone will tell everybody the address as we're going to the truck.

Q. Is that what happened that night?

A. Yes.

Q. So you were in the fire station when somebody told you, "We're going to 6017 58th Street North?"

A. Yes.

Q. Did you know where that was?

A. Yes.

Q. Were you driving a truck? How many trucks responded?

A. Two.

Q. I'm not a firefighter, but are they different? Could you describe how they're different, or are they the same?

A. The engine is a pumper that carries the water and puts out the fire. And I was in the rescue truck.

Q. That is the one —

A. It has the first aid equipment and the rescue equipment.

Q. What kind of neighborhood is that address?

MR. MORSE: Object to the form. It's ambiguous. What kind of neighborhood is that.

MR. MORSE: Well, you know what it is.

MR. MORSE: No, I don't understand that question.

MR. CLARK: He said he knows where it is. And I want to know how he knows where it is.

MR. MORSE: I object to the form.

MR. CLARK: Well, he can answer it.

A. It's Airport Hills. It's a neighborhood near the airport. It was annexed into Tarrant at some time.

Q. Is there anything different about that neighborhood than any other neighborhood in Tarrant?

A. Not in particular.

Q. Are there more Black persons that live in that section of town than any other section of town?

MR. MORSE: I, again, object to the form. If you know the answer to that question, go ahead, if you know the answer.

A. Yes.

Q. How do you know that?

A. Experience.

Q. You said "experience." What sort of experience?

A. Well, just you get to know your territory. You know where the plugs are.

Q. How do you know the people that live in the houses?

A. We don't.

Q. Well, how do you know that that's a neighborhood where more Black folks live?

A. The previous runs that we made in that area and from riding around studying territory.

Q. Do you see the people around the houses?

A. Yes.

Q. And you obviously can see the color of the skin of the folks in the houses?

A. Yes.

Q. How long was it from the time that you found out that you were going to a fire until the time that you got there?

A. How long in minutes?

Q. In minutes, or in hours, or in days, or weeks, or however long it

A. Four minutes.

Q. Four minutes. How do you know it's four minutes?

A. We tell the police dispatcher when we get on the scene. And it's logged.

Q. Do you have any independent recollection of how long it took you?

A. No.

Q. So you don't know if it was four minutes? You're just reading off of Plaintiff's 2(a)?

A. Yes.

Q. So the real answer to that

* * *

knowledge, from the time that she told you until the Fire Department got there it was twenty minutes?

A. I believe it was twenty minutes, because they didn't come right on.

Q. Okay. Now, are there any complaints that you have, any problems that you have with the Tarrant Fire Department other than what you have told me about? I know you told me the man putting the hose down.

A. No.

Q. Is there anything that makes you think that they didn't come out there that quickly just because you were black?

A. I can't tell you that either. I know one thing, they took their time coming out there. And I didn't have any help from either one of them to help me get my wife out.

Q. Do you have any information or any knowledge or any facts to show that they denied services to you or your family out you were black?

A. No, they didn't. That is all I can say. They didn't help me get my wife out, because I was standing here as close as from me to you when I asked him.

Q. There are other black families than you folks that live there in Tarrant, isn't there?

A. Yes.

Q. To your knowledge, have any of them had any problems of any type with the Tarrant Fire Department?

A. Not that I know of, because ain't nobody else's house got burned up as far as I know anything about.

Q. Have any of the others needed emergency services of any type where they might have called the Tarrant Fire Department?

A. Not that I know of.

Q. You don't know of anything that would indicate to you that fire protection was denied to you or any other black families out in Tarrant because y'all were black and not white?

A. I don't know.

Q. All right, sir. Now, while we have told me about this, have you told me about all of the conversations that you had with anybody from the Tarrant Fire Department?

A. I never had a conversation with them.

Q. Other than the one man?

A. Other than the one man. I asked him what I just told you.

Q. He is the only person you talked with? That is right.

A. That is right.

Q. Have you talked with any people from the Tarrant Fire

* * *

A. That information is that at the time my mother was taken from the house and placed on the ground, no CPR was administered.

Q. Do you know if she was, at that time when she was taken from the house and placed on the ground, do you know of your own knowledge as to whether she was living or dead at that time?

A. I do not.

Q. All right, sir. Now, do you have any information from any source that the City of Tarrant denied services or protections to any minority groups?

A. To the best of my knowledge as far as I can remember — to any minority groups?

Q. Yes, sir. Blacks, Hispanics, anyone other than, I guess, white male is a minority group now.

A. I don't. I don't. I know one other incident where a fire occurred in our neighborhood.

Q. What was that incident?

A. There was a fire at Ms. Pugh's house. It is on the next block, around the corner on the next block from my mother's house.

Q. Do you know how long ago it was that a fire occurred?

A. I can't remember.

Q. Just to get some kind of frame, five years, ten years, twenty?

A. I can't remember. Five. I can't remember.

Q. Ms. Pugh, would that be the mother of the gentleman you talked to out there about this?

A. The grandmother.

Q. What was there about that fire that led you to the conclusion that the Fire Department wasn't providing services to her?

A. The house was destroyed.

Q. Was there any indication that you got from her that the Fire Department was slow in getting there or did something improperly in putting the fire out?

A. I never talked to Ms. Pugh directly.

Q. Who did you talk to?

A. It is from what I heard.

Q. Who did you hear it from?

A. I heard it from talking with my brother.

Q. We talked about your brother. Is that your brother that is here in the room with us now, Leon Jefferson?

A. Yes.

Q. What did he tell you?

A. We had conversations about the fire at Ms. Pugh's house.

Q. All right. What did he tell you about it, specifics?

A. Her house was destroyed.

Q. All right. Did he tell you that the Fire Department was called and they did not come out there?

A. Her house was destroyed. I mean, it — they were slow in getting there, too. The Fire Department was slow in getting to Ms. Pugh's house, also.

Q. Were any criticisms of Fire Department given to you by brother or anyone else on the Pugh fire other than the fact they were slow in getting there?

A. Not that — other people saying it? Not that I can recall.

Q. Do you yourself have any other facts that indicate to you that the City of Tarrant Fire Department has been denying fire protection to you or anyone else in Tarrant because they are a minority group?

A. No, other than the incidents that I described that — these things that we talked about.

Q. The incident that occurred to your mother and the incident that occurred to Ms. Pugh?

A. As best that I can remember.

Q. All right. Do you have any other information yourself that the City of Tarrant in any way refused to provide services or deny services to any minority groups other than what you have told me about?

A. The best I can remember, no.

Q. Do you have any other criticisms, you, yourself, and as administrator of the estate; do you have any other criticisms of anything that the City of Tarrant did or didn't do other than what you have told me about?

MR. BRIAN CLARK: Object to the form.

A. Any other criticisms? When you say criticisms, what do you mean?

* * *

Q. Anybody else that you saw that you recognized out there?

A. Not at that time. Ms. Noland was there, but he she was standing in the front of her house. That wasn't anywhere back near where the fire was.

Q. Did you stay there until the coroner got there?

A. Yes.

Q. Did you stay there until they removed your mother's body?

A. That is correct.

Q. Were the Fire Department people still there at that time?

A. That is correct.

Q. Now at any time thereafter, other than talking with Captain Jones, have you talked with anybody that is associated with the City of Tarrant about this incident?

A. No, I didn't talk with anyone but Captain Jones.

Q. Now, have you talked with anybody or do you have any information that the City of Tarrant out there denied fire protection to people out there because they were minorities or blacks?

A. Well, Tarrant, from the Pugh incident that occurred maybe in '90 or '91. You have that in your interrogatory questions, Ms. Pugh, the year the fire started and everything. She stated the fact that they were somewhat slow about getting to house when her house caught

on fire. They were very slow. They were sluggish. And when they got there they are sluggish about doing their work, very slow, very sluggish. Said she could have put out the fire herself probably at the time they got out here, you know, and she would probably tell you the same.

Q. Any other incidents that you are aware of that anybody has told you about or that you personally know other than the Pugh incident?

A. No, nothing other than the Pugh incident. And from that pattern, the sluggishness, the slowness, from that pattern in that area, just blacks in that area, on 58th, 59th, 57th. There is no other area that blacks are in, on that pattern, they are slow and sluggish and did not do a sufficient job.

Q. You think they are slow and sluggish because of the problem Ms. Pugh had at her house and because you think it took them a long time to get to your parents' house?

A. From that pattern, that, and then from the same pattern that occurred some four or five years later after Ms. Pugh's incident. They was not very slow and very sluggish, not efficient. They didn't perform a distinguish job.

Q. All right. You talked about an incident four or five years after Ms. Pugh. Is that what you are talking about?

A. Ms. Pugh and my parents. That is what I am talking about.

Q. All right. Any other incidents other than those two incidents of which you are aware?

A. No.

Q. Do you have any information that they, that the people out there just deny fire protection services to members of minority groups other than what you have told me about?

A. Other than nothing but what I told you about. That is all I know.

Q. All right. And any statements that you made that they just don't provide fire protection to blacks or minorities based on the problems that you had at your house or our mom and dad's house —

A. Right.

Q. — has anybody else told you of any problem they have had with the Tarrant Fire Department or the Tarrant Police Department of any type?

A. I just heard some years ago back they were slow when it come to black people, period. I just heard that maybe from some people in the area. I don't know of any names that I recall. From the Pugh pattern to the Jefferson pattern, I found that to be kind of true.

Q. Can you give me a judgment as to how long you were out there from the time you got out there, and got out of your car until the time that you were able to get your mom out of the house?

A. Give you a time from the time that I ran out of the car, Al and I ran around the side of the house, I can't nail it down, but it was immediately.

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)	
and as the Administrator of the)	
Estate of ALBERTA K. JEFFERSON;)	
LEON JEFFERSON and BENJAMIN)	
JEFFERSON,)	
)	
Plaintiffs,)	
vs.	)	Civil Action No.
	)	CV 94-4523
CITY OF TARRANT, ALABAMA;)	
CITY OF TARRANT, ALABAMA)	
FIRE DEPARTMENT,)	
)	
Defendants.)	

MOTION TO DISMISS OR, IN THE ALTERNATIVE,
TO STRIKE "CITY OF TARRANT, ALABAMA FIRE
DEPARTMENT" AS PARTY DEFENDANT

The defendants, City of Tarrant, Alabama, a municipal corporation, and "City of Tarrant, Alabama Fire Department," move the Court to enter an Order dismissing or striking the "City of Tarrant, Alabama Fire Department" as a party defendant. As grounds, the defendants state the following:

1. As the plaintiffs acknowledge in their Complaint, the defendant, City of Tarrant, Alabama, is a municipal corporation organized under the laws of Alabama.
2. § 11-43-140, Ala. Code states in pertinent part: "Cities and towns may maintain and operate a volunteer or paid fire department."
3. There is no person or legal entity described as the "City of Tarrant, Alabama."

4. The City of Tarrant, Alabama maintains a fire department pursuant to § 11-43-140.

5. Tarrant's fire department is not a separate governmental entity or municipal corporation. Rather, the City of Tarrant, Alabama maintains and operates a fire department under § 11-43-140 as a municipal service.

6. It is self-evident that to be a party to a lawsuit, one must be a person, either natural or created by law. The Tarrant Fire Department is neither.

WHEREFORE, PREMISES CONSIDERED, the defendants move the Court to enter an Order dismissing or striking the "City of Tarrant, Alabama Fire Department."

/s/ Wayne Morse

John W. Clark, Jr.

Wayne Morse

Attorneys for CITY OF TARRANT,
ALABAMA and CITY OF TARRANT,
ALABAMA FIRE DEPARTMENT

OF COUNSEL:

CLARK & SCOTT, P.C.

3500 Blue Lake Drive, Suite 350

Birmingham, AL 35243-1907

(205) 967-9675

NOTICE OF HEARING

This Motion to Dismiss or, in the Alternative, to Strike "City of Tarrant, Alabama Fire Department" as a Party Defendant is set before Judge Drayton N. James, Circuit Court Judge, Jefferson County, on July 17, 1995 at 8:15 a.m.

CERTIFICATE OF SERVICE

I hereby certify that I have hand delivered a copy of the foregoing Motion to Dismiss or, in the Alternative, to Strike "City of Tarrant, Alabama Fire Department" as a Party Defendant to the following attorney of record on June 30, 1995:

Dennis G. Pantazis, Esq.

1400 SouthTrust Tower

Birmingham, AL 35203

/s/ Wayne Morse

OF COUNSEL

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)	
and as the Administrator of the)	
Estate of ALBERTA K. JEFFERSON;)	
LEON JEFFERSON and BENJAMIN)	
JEFFERSON,)	
)	
Plaintiffs,)	
vs.	)	Civil Action No.
	)	CV 94-4523
CITY OF TARRANT, ALABAMA;)	
CITY OF TARRANT, ALABAMA)	
FIRE DEPARTMENT,)	
)	
Defendants.)	

MOTION TO LIMIT PLAINTIFFS' DEMAND FOR
JUDGMENT TO STATUTORY LIMIT

The defendants, City of Tarrant, Alabama, and City of Tarrant, Alabama Fire Department, move the Court to enter an Order striking the Plaintiffs' demand for judgment and limiting the plaintiffs' demand for damages to One Hundred Thousand Dollars (\$100,000.00). In support of this Motion, the defendants offer the following:

1. The defendants are a governmental entity as that term is used in § 11-93-2 Ala. Code, which limits the recovery of damages against a governmental entity to \$100,000 for bodily injury or death.

2. This action seeks damages for death and outrage. Accordingly, § 11-93-2 applies.

3. The plaintiffs seek One Million Dollars (\$1,000,000.00) in each Count of the Complaint.

4. The plaintiffs contend the statutory cap is inapplicable because Counts IV and V seek damages under 42 U.S.C. § 1983 for infringement of the decedent's constitutional rights. *See Patrick v. City of Florala*, 793 F.Supp. 301, 302 (M.D. Ala. 1992) ("[S]tate statutes purporting to limit the damages available in a suit against a state action are not applicable to suits brought under § 1983.")

5. In Count IV, the plaintiffs allege that the decedent was denied her constitutional right to due process of law, because of her race, when the employees of the Tarrant Fire Department did not rescue and revive her. In Count V, the plaintiffs allege that the decedent was denied equal protection and that the Tarrant Fire Department engaged in a pattern and practice of discrimination toward minorities.

6. Counts IV and V, however, fail to state a cognizable claim for relief. The Due Process Clause of the Fourteenth Amendment to the United States Constitution "generally confers no affirmative right to governmental aid." *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 195-96, 109 S.Ct. 998, 1003 (1989). Applying this constitutional principle in the context presented, courts have uniformly held that there is no constitutional right to be rescued by the government, and inept rescue is not a cognizable theory for due process liability under § 1983. *Culver-Union Township Ambulance Serv. v. Steindler*, 629 N.E. 2d 1231, 1234 (Ind. 1994); *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983), *cert. den'd*, 465 U.S. 1049, 104 S.Ct. 1325 (1984).

7. Similarly, the plaintiffs have no equal protection claim. As other courts have declared, if the plaintiffs have a constitutional claim under the allegations presented, it is under the Due Process Clause, but no such claim exists here because there is no constitutional right to rescue services. *Steindler*, 629 N.E. 2d at 1234; *Jackson*, 715 F.2d

1200. Likewise, the plaintiffs have no equal protection claim because they are unable to prove an "intent to discriminate" on the part of Tarrant City. *Elston v. Talladega County Board of Education*, 997 F.2d 1394, 1406 (11th Cir. 1993).

8. Importantly, neither compensatory nor punitive damages are recoverable against a municipality in an action brought under § 1983 for violation of constitutional rights where the survival of the decedent's claim is governed by the Alabama wrongful death statute. *Carter v. City of Birmingham*, 444 So.2d 373 (Ala. 1983), *cert. den'd*, 467 U.S. 1211, 104 S.Ct. 2401 (1984). This action is governed by the Alabama wrongful death statute. *Id.* Therefore, neither compensatory nor punitive damages are recoverable, the plaintiffs do not state a cognizable claim under § 1983, and the defendants are entitled to dismissal of Counts IV and V. *Id.*

WHEREFORE, PREMISES CONSIDERED, the defendants move the Court to enter an Order as follows:

- (a) striking the plaintiffs' demands for judgment;
- (b) limiting the plaintiffs' demand for judgment to an amount not to exceed One Hundred Thousand Dollars (\$100,000.00);
- (c) directing the plaintiffs or their counsel or their witnesses or their other witnesses not to testify, mention or imply that the plaintiffs are entitled to a recovery in excess of the statutory limit of One Hundred Thousand Dollars (\$100,000.00).

/s/ Wayne Morse

John W. Clark, Jr.

Wayne Morse

Attorneys for CITY OF TARRANT,
ALABAMA and CITY OF TARRANT,
ALABAMA FIRE DEPARTMENT

OF COUNSEL:

CLARK & SCOTT, P.C.

3500 Blue Lake Drive, Suite 350

Birmingham, AL 35243-1907

(205) 967-9675

NOTICE OF HEARING

This Motion for Summary Judgment is set before the Honorable Drayton N. James, Circuit Court Judge, Jefferson County, on July 17, 1995 at 8:15 a.m.

CERTIFICATE OF SERVICE

I hereby certify that I have hand delivered a copy of the foregoing Motion to Limit Plaintiffs' Demand for Judgment to Statutory Limit to the following attorney(s) of record on June 30, 1995:

Dennis G. Pantazis, Esq.
1400 SouthTrust Tower
Birmingham, AL 35203

/s/ Wayne Morse

OF COUNSEL

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)
and as the Administrator of the)
Estate of ALBERTA K. JEFFERSON;)
LEON JEFFERSON and BENJAMIN)
JEFFERSON,)
)
Plaintiffs,)
)
vs.	) Civil Action No.
	) CV 94-4523
CITY OF TARRANT, ALABAMA;)
CITY OF TARRANT, ALABAMA)
FIRE DEPARTMENT,)
)
Defendants.)

MOTION FOR JUDGMENT ON THE PLEADINGS -

The defendants, City of Tarrant, Alabama, and City of Tarrant, Alabama Fire Department, move the Court to enter an Order granting judgment on the pleadings in favor of the defendants as to Counts IV and V of the Complaint. Pursuant to Rule 12(c), Ala.R.Civ.P., the defendants are entitled to a judgment as a matter of law and dismissal of Counts IV and V based solely on the pleadings. Alternatively, the defendants request the Court to consider this Motion as one for summary judgment and consider this Motion as part of the Defendants' Motion for Summary Judgment filed on June 26, 1995 and scheduled for a hearing on July 17, 1995. In support of this Motion, the defendants state the following:

1. Counts IV and V of the Complaint seek compensatory and punitive damages against the defendants, a municipality, under 24 U.S.C. § 1983, for violation of due

process and equal rights under the Fourteenth Amendment to the United States Constitution. Specifically, plaintiff Melvin Jefferson, as personal representative of the estate of Alberta K. Jefferson, alleges that Ms. Jefferson's death was caused by the defendants' unconstitutional actions. The remaining Counts seek recovery based on Alabama tort law claims.

2. According to the Alabama Supreme Court and the U.S. District Court for the Northern District of Alabama, survival of a decedent's claim for compensatory damages under § 1983 against a municipality is governed by the Alabama wrongful death statute, not federal law; thus, a claim for compensatory damages against a municipality does not survive. *Carter v. City of Birmingham*, 444 So.2d 373 (Ala. 1983), *cert den'd*, 467 U.S. 1211, 104 S.Ct. 2401 (1984); *Brown v. Morgan County*, 518 F.Supp. 661 N.D. Ala. 1981).

3. "Compensatory damages are not available to a plaintiff maintaining a § 1983 case in reliance on the Alabama wrongful death act . . ." *Carter*, 444 So.2d at 377 (quoting *Brown*, 518 F.Supp. at 665).

4. Municipalities are immune from punitive damages under § 1983, *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 101 S.Ct. 2748 (1981); *Carter*, 444 So.2d at 373.

5. The claims of the plaintiff Melvin Jefferson brought in Counts IV and V of the Complaint under § 1983 are brought "in reliance on the Alabama wrongful death statute." *Carter*, 444 So.2d at 373.

6. Accordingly, because Ms. Jefferson's claim for compensatory damages under § 1983 did not survive, and because Ms. Jefferson's personal representative is not entitled to recover either compensatory or punitive damages, the defendants are entitled to a judgment as a matter of law. *Carter*, 444 So.2d at 373 (holding that City of Birmingham was entitled to a summary judgment in a

§ 1983 action because decedent's claim for compensatory damages did not survive and punitive damages are not recoverable against a municipality).

WHEREFORE, PREMISES CONSIDERED, the defendants respectfully request the Court to enter a judgment in their favor as to Counts IV and V of the Complaint, brought under § 1983, for the reasons stated.

/s/ Wayne Morse

John W. Clark, Jr.

Wayne Morse

Attorneys for CITY OF TARRANT,
ALABAMA and CITY OF TARRANT,
ALABAMA FIRE DEPARTMENT

CLARK & SCOTT, P.C.

3500 Blue Lake Drive, Suite 350

Birmingham, AL 35243-1907

(205) 967-9675

NOTICE OF HEARING

This Motion for Judgment on the Pleadings is set before the Honorable Drayton N. James, Circuit Court Judge, Jefferson County, on July 17, 1995 at 8:15 a.m.

CERTIFICATE OF SERVICE

I hereby certify that I have hand delivered a copy of the foregoing Motion for Judgment on the Pleadings to the following attorney of record on June 30, 1995:

Dennis G. Pantazis, Esq. 1

400 SouthTrust Tower

Birmingham, AL 35203

/s/ Wayne Morse

OF COUNSEL

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, et al.,)

Plaintiffs,)

V.)

CITY OF TARRANT, ALABAMA,)
et al.,)

Defendants.)

) CIVIL ACTION NO.

) CV 94-4523

) (JUDGE JAMES)

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTION TO LIMIT PLAINTIFFS' DEMAND FOR JUDGMENT TO STATUTORY LIMIT

COME NOW the plaintiffs in the above-referenced case, by and through their undersigned counsel, and submit this opposition to the Motion for Judgment on the Pleadings filed by defendants City of Tarrant, Alabama and City of Tarrant, Alabama Fire Department.

I. PREFATORY STATEMENT

A thorough recitation of the facts is contained in Plaintiffs' Opposition to Motion for Summary Judgment filed herewith, and does not bear repeating here. However, some procedural background is necessary. This case arises out of a residential fire leading to the death of Alberta K. Jefferson on December 4, 1993. Plaintiffs' Complaint contains state causes of action, and claims in Court IV and V brought pursuant to 42 U.S.C. §1983 for the denial of due process and equal protection. On June 30, 1995, Defendants filed a motion seeking dismissal of

Plaintiffs' 42 U.S.C. §1983 claims, and a Motion to Limit Plaintiffs' Demand for Judgment to Statutory Limit.

II. ARGUMENT

A. State Law Claims Do Not Replace Section 1983 Remedies.

While state courts may entertain actions brought under the 42 U.S.C. §1983, *Ferrell v. City of Bessemer*, 406 So. 2d 337 (Ala. 1980), Section 1983 affords a federal cause of action for citizens deprived of the rights, privilege and immunities guaranteed by the Fourteenth Amendment by state agencies. *Monroe v. Pape*, 81 S.Ct. 473, 480 (1961). While the same facts may give rise to state law causes of action, those state law claims do not displace the parallel federal claim. "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe*, 81 S.Ct. at 482.

B. The Construction Of The Alabama Wrongful Death Action And Section 1983 Claim In *Carter v. City of Birmingham* Is Inconsistent With Federal Law, And Is Not To Be Applied In This Case.

1. *Carter* Fails To Consider The Supremacy Of The Federal Remedy.

Defendants rely on the case of *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983) in their attempt to eliminate Plaintiffs' equal protection claims. Section 1983 has no survivorship provision, however, 42 U.S.C. §1988 provides that in cases where the federal civil rights laws are deficient, the relevant state law will apply. As such, in Alabama the state wrongful death statute, Ala. Code §6-5-410 (1975) will apply.

Defendants, citing *Carter*, argue that because the Alabama wrongful death act provides only for punitive damages, and because the United States Supreme Court in *City of Newport v. Fact Concerts, Inc.*, 101 S.Ct. 2748 (1981), held that municipalities are immune from punitive damages under §1983, a §1983 claim cannot be against a municipality where the party denied equal protection of the law dies as a result of said denial. This argument, however, ignores the overwhelming weight of federal authority to the contrary that is binding on this Court when it decides federal claims.

This very issue was decided in *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986). In that case, the *Carter* analysis was specifically rejected. The law is clear that, "Under §1988, courts may decline to apply state law if it is inconsistent with the Constitution and laws of the United States." *Weeks*, 649 F. Supp. at 1304.

It is clear that the *Carter* construction of the Alabama wrongful death statute is inconsistent with §1983. The U. S. Supreme Court in *Robertson v. Wegmann*, 98 S.Ct. 1991 (1978) set out the test for determining whether a state statute is inconsistent with 42 U.S.C. §1983:

Correct analysis requires a determination of whether the application of a state statute in a particular case has the result not merely of causing the plaintiff's claim to fail, but also of undermining the policies of compensation and deterrence underlying §1983.

Id., at 1305. Those policies underlying §1983 include "compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." *Robertson*, 98 S.Ct. at 1995.

The *Weeks* court succinctly stated why the *Carter* application of the Alabama wrongful death statute is inconsistent with federal law:

A strict application of the Alabama wrongful death statute in cases involving municipal or county liability cannot be justified under the Robertson Court's analysis. The Alabama statute provides for the recovery only of punitive damages, but municipalities and counties are immune from these damages in actions under §1983. Thus, the strict application of the Alabama statute in such cases would result in the complete immunization of those entities from damages, at least in cases where the decedent's death resulted from their wrongful acts. Alabama municipalities and counties would know, in advance, that they would never be monetarily liable under §1983 for acts that cause deprivations of constitutional rights as long as the victims die. The policy of deterrence of official misconduct that underlines §1983 would obviously be severely undermined if the Alabama wrongful death statute is applied in a way that eliminates municipal and county liability in such cases. n8 Moreover, §1983's policy of compensating the victims of official misconduct would also be undermined.

Weeks, 649 F. Supp. at 1305.

Mindful of the goal of compensation and deterrence in a §1983 claim, the *Weeks* Court held that compensatory damages are allowable against an Alabama municipality on a §1983 claim.

This Court therefore holds that, in actions under §1983, where the liability of a municipality, county, or other local governmental entity is at issue, and where the alleged unconstitutional acts result in the death of the victim, the Alabama wrongful death act should be applied only to the extent that the decedent's action is permitted to survive. The wrongful death statute

should not be held to foreclose the recovery of compensatory damages against the governmental entity in question, for such a result would be inconsistent with the policies underlying §1983.

Id.

2. Courts Have Consistently Held That State Laws Damage Restrictions Such As Alabama's Wrongful Death Act Are To Be Disregarded When They Conflict With §1983 Policy.

The *Weeks* decision is well accepted as the majority position. *See, McFadden v. Sanchez*, 710 F.2d 907 (2d Cir.) (refusing to apply New York survival statute's limitation on the recovery of punitive damages for death of decedent), cert. denied, 464 U.S. 961, 104 S. Ct. 394, 78 L.Ed. 2d 337 (1983); *Heath v. City of Hialeah*, 560 F. Supp. 840 (S.D. Fla. 1983) (refusing to apply Florida statute's ban on the recovery of decedent's damages); *Sager v. City of Woodland Park*, 543 F. Supp. 282 (D. Colo. 1982) (refusing to apply restrictions on recoverable damages in Colorado statutes); *O'Connor v. Several Unknown Correctional Officers*, 523 F. Supp. 1345 (E.D. Va. 1981) (refusing to apply the Virginia wrongful death statute's bar on recovery of decedent's damages or punitive damages).

The *Carter* Court applied the Alabama Wrongful Death Act to the plaintiffs' §1983 claim only through §1988. The standard, however, is that "to whatever extent §1988 makes state law applicable to Section 1983 actions, it does *not* require deference to a survival statute that would bar or limit the remedies available under Section 1983 for unconstitutional conduct that causes death." *McFadden, supra* at 911.

3. The Federal Law Articulated in *McFadden* And *Weeks* Is Binding On Alabama Courts.

A Section 1983 claim is a federal claim based on a federal statute. When that is the case, the law is clear that the Alabama courts are bound by federal precedent.

We are here concerned with a federal statute. Decisions of appellate federal courts, construing federal statutes, in the absence of a contrary holding by the Supreme Court of the United States, are binding on us. *Dickey v. West Boylston Mfg. Co.*, 251 Ala. 19, 36 So. 2d 106. And of course we are controlled by decisions of the United States Supreme Court in respect to its interpretation of federal statutes. *Atlantic Coast Line Ry. Co. v. Mangum*, 250 Ala. 431, 34 So. 2d 848.

Central of Georgia Ry. Co. v. Ramsey, 275 Ala. 7, 151 So. 2d 725 (Ala. 1962); *Oualls v. Citizens Bank*, 532 So. 2d 1039, 1040 (Ala. Civ. App. 1988) (When a decision by a federal appellate court is issued on a federal question, that decision is ordinarily binding on Alabama state courts).

The only Circuit Court directly addressing the issue, *McFadden*, has spoken loud and clear on this federal question, holding that "we have no doubt that limitations in a state survival statute have no application to a §1983 suit brought to redress a denial of rights that caused the decedent's death." *McFadden*, 710 F.2d at 911. As such, no deference is to be given the Alabama wrongful death act where it would deprive a federal cause of action.

The *Weeks* and *McFadden* decisions are the prevailing position. Moreover, contrary to Defendants' assertion, *Brown v. Morgan County*, 518 F. Supp. 661 (Ala. 1981) does not support the *Carter* construction. *Brown* specifically states that it does not decide the issue

The court notes that, in instances where a wrongful death action is brought against a municipality under 1983 in Alabama, the result reached in this case, coupled with the recent Supreme Court opinion in *City of Newport v. Fact Concerts, Inc.*, ___ U.S. ___, 101 S.Ct. 2748, 69 L.Ed.2d 619 (1981), which held that municipalities are immune from punitive damages in civil rights suits under 1983, bars recovery against municipalities for wrongful deaths caused by them in Alabama . . . The act was amended to . . . Absent amendment, the court expresses no opinion on how the inconsistency would be remedied in Alabama death cases under 1983.

Brown, 518 F. Supp. at 664, n.3. The Northern District of Alabama has not passed on this issue. Because the federal appellate court's decision is binding precedent on this federal question, Defendants' reliance on *Carter* is not well-founded.

C. Because Plaintiffs Have A Proper Claim Under 42 U.S.C. §1983, The \$100,000.00 Statutory Damages Cap Is Not Applicable.

The Court in *Patrick v. City of Florala*, 793 F. Supp. 301 (M.D. Ala. 1992), clearly sets out the standard that the \$100,000.00 damages cap is inapplicable to a §1983 claim. In *Patrick*, the defendants moved to strike any claims for damages in excess of \$100,000.00 against a municipality where the complaint charged the defendants with violations of 42 U.S.C. §1983. In that case, the Court held that Alabama statutory cap of \$100,000.00 on damages recoverable against municipalities, Ala. Code §11-93-2 (1975) did not apply to federal §1983 claims. The *Patrick* Court, citing *Gamble v. Florida Department of Health & Rehabilitation Services*, 779 F.2d 1509, 1518 (11th

Cir. 1986) held that the availability of damage under §1983 is a question of federal law, not state law, and the application of an arbitrary \$100,000.00 limit to awards against municipalities frustrates the goals of the Federal Act. Similarly, the plaintiffs federal claims are in no way limited by the Alabama statute in the present case.

WHEREFORE, PREMISES CONSIDERED, Defendants' Motions for Judgment on the Pleadings and Motion to Limit Plaintiffs' Demand for Judgment to Statutory Limit are therefore due to be denied.

RESPECTFULLY SUBMITTED,

/s/ Brian M. Clark

Brian M. Clark and
Dennis G. Pantazis
Attorneys for Plaintiffs

OF COUNSEL:

GORDON, SILBERMAN, WIGGINS & CHILDS, P. C.
1400 SouthTrust Tower
Birmingham, Alabama 35203
Telephone: (205) 328-0640

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Plaintiffs' Opposition to Motion for Summary Judgment upon the counsel for the defendants, by hand-delivering a copy of same on this the 14th day of July, 1995.

John W. Clark, Jr., Esq.

Wayne Morse, Esq.

CLARK & SCOTT, P. C. 3500

Blue Lake Drive

Suite 350

Birmingham, Alabama 35243-1907

/s/ Brian M. Clark

Brian M. Clark

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)
and as the Administrator of the)
Estate of ALBERTA K. JEFFERSON;)
LEON JEFFERSON and BENJAMIN)
JEFFERSON,)
)
Plaintiffs,)
)
vs.	) Civil Action No.
	) CV 94-4523
CITY OF TARRANT, ALABAMA;)
CITY OF TARRANT, ALABAMA)
FIRE DEPARTMENT,)
)
Defendants.)

DEFENDANTS' MOTION TO STRIKE PLAINTIFFS'
OPPOSITION TO SUMMARY JUDGMENT AND
JUDGMENT ON THE PLEADINGS

The Defendants, City of Tarrant, Alabama and City of Tarrant Fire Department, move the court to strike the Plaintiffs' Opposition to Defendants' Motion for Summary Judgment and Motion for Judgment on the Pleadings consisting of the Affidavits of Ida Bell Pugh and Demetrius Webb, plus citation of legal authority and argument. In support of this Motion, the Defendants state the following.

The Affidavits and deposition testimony offered by the Plaintiff are not admissible evidence and therefore should not be considered.

1. "Evidence that is not admissible at trial can not be considered on a motion for summary judgment." *Yar-*

brough v. Springhill Memorial Hosp., 545 So.2d 32, 34 (Ala. 1989). Speculation and conclusory allegations are insufficient to create genuine issues of material fact. *Tinsley v. Harrison*, 613 So.2d 1268 (Ala. 1993).

2. The Affidavits of Mr. Webb and Mr. Pugh do not set forth specific facts admissible as evidence as required by Rule 56 and Alabama case law; rather, the Affidavits consist of irrelevant and prejudicial information, inadmissible hearsay, speculation, conjecture and conclusory allegations.

3. This is an action seeking damages based on allegations of wrongful death, outrage and civil rights.

4. Nonetheless, the Affidavit of Mr. Webb, an African-American formerly employed as a Tarrant firefighter, states: his "bed intentionally soiled" while he worked at Tarrant; the Tarrant firefighters knew which sections of Tarrant were "predominantly white" and which sections were "predominantly black"; and Tarrant personnel reacted "more slowly to fires they knew were in black neighborhoods as opposed to fires in white neighborhoods."

5. Mr. Webb's Affidavit does not contain any information relevant to the issue in this lawsuit, does not set forth specific facts, and contains prejudicial remarks, speculation and conclusory allegations. Mr. Webb's Affidavit is not admissible evidence.

6. Ms. Pugh's Affidavit states that when she experienced a residential fire the Tarrant Fire Department arrived in ten minutes and "they made no attempt to put out the fire quickly."

7. Likewise, Ms. Pugh's Affidavit is due to be stricken because it is conclusory, speculative and fails to set forth specific facts admissible as evidence.

8. Additionally, The Plaintiffs' Opposition contains not a single page of deposition testimony. Rather, the Plaintiffs' Brief contains argumentative assertions, as well

as self-serving characterizations and excerpts, which seek legitimization by reference to a deposition page not included in the Opposition or as an exhibit. Self-serving and argumentative assertions of deposition testimony should not be considered as evidence.

The Plaintiffs' Opposition was not timely served.

9. On June 24, 1995, the Defendants served their Motion for Summary Judgment on the Plaintiffs.

10. Originally set for a hearing on July 7, 1995, the Defendants' Motion was continued to July 17 at 8:15 a.m. at the Plaintiffs' request. Plaintiffs represented to the Court that this continuance would give the Plaintiffs sufficient time to prepare an opposition to summary judgment and have it served in a timely manner.

11. Rule 56(c)(2) provides that "any statement or affidavit in opposition shall be served at least two (2) days prior to hearing."

12. Notwithstanding the Plaintiffs' representations and the requirements of Rule 6(c)(2), the Plaintiffs served their Opposition one day before the hearing.

13. The Plaintiffs' Opposition was served by hand delivery at 3:30 p.m. on July 14, 1995.

14. In computing time prescribed by the Alabama Rules of Civil Procedure, Rule 6(a) states that "the day of the act, event, or default from which the designated period of time begins to run shall not be included." In addition, Rule 56(a) provides: "When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation."

15. The Plaintiffs served their Opposition on a Friday (July 14 at 3:30 p.m.). Because the hearing is scheduled for a Monday, Rule 56(c)(2) precludes the counting of Saturday and Sunday. Thus, the Opposition was served one day before the hearing and is due to be stricken.

16. Affidavits opposing summary judgment not served in the time allowed by Rule 56(c)(2) are due to be stricken. *Speer v. Pin Palace Bowling Alley*, 599 So.2d 1140 (Ala. 1992); *Denson v. Blake*, 642 So.2d 975 (Ala. Civ. App. 1993) (holding that affidavits in opposition in summary judgment served on day of hearing may not be considered in court's discretion).

WHEREFORE, PREMISES CONSIDERED, the Affidavits offered by the Plaintiffs, as well as their self-serving and argumentative characterizations of deposition testimony, is due to be stricken.

/s/ Wayne Morse

John W. Clark, Jr.

Wayne Morse

Attorneys for the CITY OF TARRANT,
ALABAMA and CITY OF TARRANT,
ALABAMA FIRE DEPARTMENT

CLARK & SCOTT, P.C.

3500 Blue Lake Drive, Suite 350

Birmingham, AL 35243-1907

(205) 967-9675

CERTIFICATE OF SERVICE

I hereby certify that I have faxed and mailed a copy of the foregoing Defendants' Motion to Strike Plaintiffs' Opposition to Summary Judgment and Judgment on the Pleadings to the following attorney(s) of record on July 16, 1995:

Dennis G. Pantazis, Esq.
1400 SouthTrust Tower
Birmingham, Alabama 35203

/s/ Wayne Morse
OF COUNSEL

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)
and as the Administrator of the)
Estate of ALBERTA K. JEFFERSON;)
LEON JEFFERSON and BENJAMIN)
JEFFERSON,)

Plaintiffs,)

vs.)

) Civil Action No.

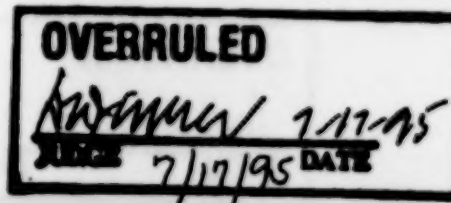
) CV 94-4523

CITY OF TARRANT, ALABAMA;)
CITY OF TARRANT, ALABAMA)
FIRE DEPARTMENT,)

Defendants.)

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The defendants, City of Tarrant, Alabama ("Tarrant City"), a municipal corporation, and City of Tarrant, Alabama Fire Department ("Tarrant Fire Department"), move the court to enter an Order granting a summary judgment in their favor and dismissing this action, pursuant to Rule 56, A.R.Civ.P. As grounds, Tarrant and the Tarrant Fire Department state that no genuine issue of material fact exists, and they are entitled to a judgment as a matter of law. In further support of this Motion, Tarrant and the Tarrant Fire Department offer the following: (a) Complaint; (b) Answer; (c) Alabama Certificate of Death for Alberta R. Jefferson; (d) the Affidavit of Kelly Bryant, Tarrant Fire Department; (e) Tarrant Fire Report for fire at Jefferson residence; (f) pages from



IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)
and as the Administrator of the)
Estate of ALBERTA K. JEFFERSON;)
LEON JEFFERSON and BENJAMIN)
JEFFERSON,)
)
Plaintiffs,)
)
vs.) Civil Action No.
) CV 94-4523
CITY OF TARRANT, ALABAMA;)
CITY OF TARRANT, ALABAMA)
FIRE DEPARTMENT,)
)
Defendants.)

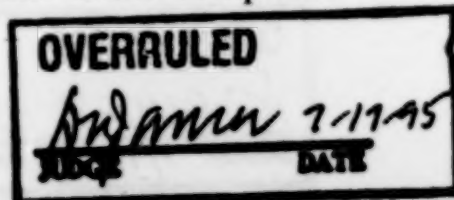
MOTION TO LIMIT PLAINTIFFS' DEMAND FOR
JUDGMENT TO STATUTORY LIMIT

The defendants, City of Tarrant, Alabama, and City of Tarrant, Alabama Fire Department, move the Court to enter an Order striking the plaintiffs' demand for judgment and limiting the plaintiffs' demand for damages to One Hundred Thousand Dollars (\$100,000.00). In support of this Motion, the defendants offer the following:

1. The defendants are a governmental entity as that term is used in § 11-93-2 Ala. Code, which limits the recovery of damages against a governmental entity to \$100,000 for bodily injury or death.

2. This action seeks damages for death and outrage. Accordingly, § 11-93-2 applies.

3. The plaintiffs seek One Million Dollars (\$1,000,000.00) in each Count of the Complaint.



IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)
and as the Administrator of the)
Estate of ALBERTA K. JEFFERSON;)
LEON JEFFERSON and BENJAMIN)
JEFFERSON,)
)
Plaintiffs,)
)
vs.) Civil Action No.
) CV 94-4523
CITY OF TARRANT, ALABAMA;)
CITY OF TARRANT, ALABAMA)
FIRE DEPARTMENT,)
)
Defendants.)

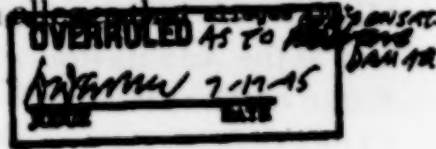
MOTION FOR JUDGMENT ON THE PLEADINGS

The defendants, City of Tarrant, Alabama, and City of Tarrant, Alabama Fire Department, move the Court to enter an Order granting judgment on the pleadings in favor of the defendants as to Counts IV and V of the Complaint. Pursuant to Rule 12(c), Ala.R.Civ.P., the defendants are entitled to a judgment as a matter of law and dismissal of Counts IV and V based solely on the pleadings. Alternatively, the defendants request the Court to consider this Motion as one for summary judgment and consider this Motion as part of the Defendants' Motion for summary Judgment filed on June 26, 1995 and scheduled for a hearing on July 17, 1995. In support of this Motion, the defendants state the following:

1. Counts IV and V of the Complaint seek compensatory and punitive damages against the defendants, a municipality, under 24 U.S.C. § 1983, for violation of due

process and equal rights under the Fourteenth Amendment to the United States Constitution. Specifically, plaintiff Melvin Jefferson, as personal representative of the estate of Alberta K. Jefferson,

7-17-95 GRANTED AS TO
PUNITIVE DAMAGES
Mr. K. Simon Judge



IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)
and as the Administrator of the)
Estate of ALBERTA K. JEFFERSON;)
LEON JEFFERSON and BENJAMIN)
JEFFERSON,)
)
Plaintiffs,)
vs.) Civil Action No.
) CV 94-4523
CITY OF TARRANT, ALABAMA,)
)
Defendant.)

STATEMENT OF CIRCUIT COURT JUDGE

On July 17, 1995, this court entered an interlocutory order denying the Motion for Summary Judgment and Motion for Judgment on the Pleadings of the Defendant, City of Tarrant, Alabama. Pursuant to Alabama Rule of Appellate Procedure 5(a), the undersigned Circuit Court Judge of Jefferson County, Alabama, certifies that said interlocutory order involves a controlling question of law as to which there is substantial ground for differences of opinion; that an immediate appeal from said interlocutory order would materially advance the ultimate termination of the litigation; and, that the appeal would avoid protracted and expensive litigation.

The interlocutory order addressed the following controlling question of law as to which there is substantial ground for difference in opinion: Whether the survival of Alberta K. Jefferson's claim for compensatory damages under 42 U.S.C. § 1983 is governed by federal common law or by reference to the Alabama wrongful death stat-

ute? In the interlocutory order, this court held that reference must be made to federal law and thereby followed *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986). Previously, the Supreme Court of Alabama held that reference must be made to the Alabama act and a decedent's claim for compensatory damages under § 1983 does not survive. *Carter v. City of Birmingham*, 444 So.2d 373 (Ala. 1983), cert. den., 467 U.S. 1211, 104 S. Ct. 2401, 81 L. Ed.2d 357 (1984). Secondly, the issue is whether the Circuit Courts of Alabama should follow the federal precedent, as this court did, or the authority of the Supreme Court of Alabama when interpreting federal statutes. Because a substantial ground for differences of opinion exists, and to avoid multiple trials and pretrial activity, the undersigned Circuit Court Judge certifies that the interlocutory order should be the subject of an appeal.

DATED: 17th day of July, 1995.

/s/ Drayton N. James
CIRCUIT COURT JUDGE
Drayton N. James

CV 94 004923 00
JUDGE: ROGER H. MONROE
DRAYTON JAMES

ALABAMA JUDICIAL DATA CENTER
CASE ACTION SUMMARY
CIRCUIT CIVIL

IN THE CIRCUIT CIVIL COURT OF JEFFERSON COUNTY

HELVIN JEFFERSON INDV/ADMR EST ALBERT JEFFERSON VS CITY OF TARRANT ALA

FILED: 6/21/94 TYPE: WRONGFUL DEATH TYPE TRIAL: JURY TRACK:

DATE: CA: 1000000.00 CA DATE: PAYMENT:

PLAINTIFF 001: JEFFERSON MELVIN INDV/ADMR EST ALBERTA K JEFFERSON
1400 SOUTHTRUST TOWER ATTORNEY: PANTAZIS, DENNIS G

SHAM AL 35203-
PHONE: 203
ENTERED: 6/29/94 ISSUED: TYPE:
SERVED: ANSWERED: JUDGEMENT:

PLAINTIFF 002: JEFFERSON LEON
1400 SOUTHTRUST TOWER ATTORNEY: PANTAZIS, DENNIS G

SHAM AL 35203-
PHONE: 203
ENTERED: 6/29/94 ISSUED: TYPE:
SERVED: ANSWERED: JUDGEMENT:

PLAINTIFF 003: JEFFERSON BENJAMIN
1400 SOUTHTRUST TOWER ATTORNEY: PANTAZIS, DENNIS G

SHAM AL 35203-
PHONE: 203
ENTERED: 6/29/94 ISSUED: TYPE:
SERVED: ANSWERED: JUDGEMENT:

DEFENDANT 001: TARRANT ALABAMA CITY OF
CLERK CITY OF TARRANT ATTORNEY: *** PRO SE ***
1604 PINSON VALLEY PRVY AL 35217-
TARRANT 203 John W. Clark Jr
PHONE: 203
ENTERED: 6/29/94 ISSUED: TYPE:
SERVED: 7-21-94 ANSWERED: 6-19-95 JUDGEMENT:

DEFENDANT 002: TARRANT ALA CITY OF FIRE DEPT
204 FORD AVE ATTORNEY: *** PRO SE ***
TARRANT AL 35217-
PHONE: 203 John W. Clark Jr
ENTERED: 6/29/94 ISSUED: TYPE:
SERVED: 7-21-94 ANSWERED: 6-19-95 JUDGEMENT:

6-21-94 SEC Trial: JUL 31 1995

8-5-94 Dkt Mr. H. D. Drayton
Not a Service of process and req for prod

8-22-94 Motion to dismiss filed Overlaid 30 see to answer Jd Monroe

8-22-94 CASE IS HEREBY PLACED ON THE docket

TRUCK ASSIGNMENT: STATES CONFERENCE IS

SCHEDULED FOR 3-24-95 AT 9:00 A.M.

Drayton N. James
Circuit Judge

LAN/062994

CV 94 004523 00
JUDGE: ROGER H. JAMES

ALABAMA JUDICIAL DATA CENTER
CASE ACTION SUMMARY
CIRCUIT CIVIL

IN THE CIRCUIT CIVIL COURT OF JEFFERSON COUNTY
MELVIN JEFFERSON INDV/ADMR EST ALBERT JEFFERSON VS CITY OF TARRANT ALA

FILED: 6/21/94 TYPE: WRONGFUL DEATH TYPE TRIAL: JURY TRACK:
DATE: CA: 1000000 00 CA DATE: PAYMENT:

9-2-94 Plega and to intro
" City B Jefferson and to intro
" City I Jefferson and to intro
9-6-94 Plega 1st req for prod to depts
" Plega 1st intro to depts
" Plega 1st req for prod
9-7-94 Not of Service of depo moved
11-4-94 Plega mtr to compul

11-14-94 **GRANTED** () Plaintiff to
Answer within 30 days
Answer and/or respond within 30 days
J. James
Date

11-29-94 Re-mot of Service of depo - ruled
1-18-95 Plega mot for default judgment
1-24-95 Not of Service of depts and to intro and req
on prod
2-17-95 Not of Service of depo re-mot
2-21-95 Plega mot to extend disc time
2-23-95 Plega mot to extend discovery granted - 45 days J. James
3-6-95 Not of Service of 2nd re-mot of depts
3-16-95 Not of depts of P. Burnett
" " " C. Hallmark
" " " C. Hallmark
3/26/95 Status conference held. Case set for trial on July 31, 1995 at 9:00 AM
Case set 1-11-11-2-1-1005 for trial
J. James
Judge Drayton James
5-12-95 Plega mot extend disc time

LAW/062994

Case Number
CV 94 4523

CASE ACTION SUMMARY
CONTINUATION

Style: Melvin Jefferson et al vs City of Tarrant Page Number 3 of 3 Pages

DATE ACTIONS, JUDGMENTS, CASE NOTES

5-17-95 DATE:
ACTION GRANTED: Time to comply
Plega mtr to compul
J. James
Judge

5-19-95 2nd mot of depts of Philip Burnett
6-19-95 Depts and to compul
6-26-95 Depts mot for 30
6-30-95 Depts, Cof T.A. Cof TAFD, mot to dismiss
6-30-95 Depts, Cof T.A. Cof TAFD mot to limit
plegs demand for judgment
6-30-95 Depts, Cof T.A. Cof TAFD, mot for judgment
on the pleadings
8/7/95 See Order Staying Trial dated 7/17/95. Also, City of Tarrant,
Alabama's Motion For Judgment On the Pleadings is granted as
to punitive damages. Defendants' motion for summary judgment
is overruled. Motion To Limit Plaintiffs' Demand is overruled.
Motion To Dismiss, Or in the Alternative, to Strike City
of Tarrant, Alabama Fire Department, is granted.
J. James
Judge Drayton James

7-17-95 Order per sup paper staying trial. J. James
7-19-95 Plega app to depts mot for judgment on pleadings
" Plega app to depts mot for judgment
" Depts mot for judgment on pleadings
" " C2, C3, C320 mot for judgment on pleadings
overruled. J. James
" Depts C2, C320 mot to limit overruled. J. James
7-19-95 " " " mot to strike

CV94-4523 MELVIN JEFFERSON V. CITY OF TARRANT, ALA.

Date	ACTIONS, JUDGMENTS, CASE NOTES
7/17/95	Motion To Dismiss Or, In The Alternative, To Strike "City of Tarrant, Alabama Fire Department" as Party Defendant is granted.
	<i>[Signature]</i> Judge Drayton James
7-17-95	<i>Ptiff's submission sheet</i>
7-17-95	<i>Statement of Circuit Court Judge</i>
7-10-95	<i>Prep partial submissions</i>
"	<i>Depo due to prep exhibit list</i>
7-14-95	<i>Affidavit of Carl Harper</i>
7-17-95	<i>Depo witness list</i>
7-25-95	<i>Not of depo & reg for prod</i>
7-1-96	<i>Letter from Tarrant County (in file)</i>
2-12-96	<i>Not of depo of CH</i>
9-9-96	<i>Mot to strike & for reconsideration</i>
9-13-96	<i>Ptiff's to not to strike & for reconsideration</i>
9/17/96	Motion To Strike The Affidavit of Carl Harper And For Reconsideration of Denial of Summary Judgment is granted as to motion to strike affidavit of Carl Harper. Motion for reconsideration of denial of summary judgment is continued generally. Copy to counsel this date.
	<i>[Signature]</i> Judge Drayton James
9-26-96	<i>Depo C of 1 - mot & Compel</i>
9-17-96	<i>Notion of depo of EDM</i>
11-12-96	<i>Depo mot for Carl & S J</i>
11-2-96	<i>City of Tarrant City, AL amendment to answer</i>
11-12-96	<i>Re-not of depo & reg for prod EDM</i>
11-26-96	<i>Depo C of 1 mot for prod & granted as to Court II. Jd James</i>
1-17-97	<i>2d acceptance & waiver</i>

IN THE SUPREME COURT OF ALABAMA

August 23, 1995

1941573

Ex parte City of Tarrant, Alabama

PETITION FOR PERMISSION TO APPEAL

(Re: Melvin Jefferson, et al. v. City of Tarrant, Alabama (CV-95-4523))

ORDER

The petition for permission to appeal from an interlocutory order entered in the above cause having been filed and duly submitted to the Court, it is considered that the petition is due to be granted.

IT IS, THEREFORE, ORDERED, pursuant to the provisions of Rule 5, Alabama Rules of Appellate Procedure, that permission is hereby granted to the petitioner to appeal to this Court from the interlocutory order entered on July 17, 1995, in the case of Melvin Jefferson, et al. v. City of Tarrant, Alabama, Civil Action No. CV-95-4523.

IT IS FURTHER ORDERED that the petitioner shall, pursuant to Rule 5(c), Alabama Rules of Appellate Procedure, pay an additional \$50.00 docket fee, as provided by Rule 35A(4), Alabama Rules of Appellate Procedure; file a docketing statement (Form ARAP 24) in the trial court for transmittal to this Court; and file a security for costs as required by Rule 7, Alabama Rules of Appellate Procedure.

IT IS FURTHER ORDERED that the petitioner shall advise this Court, in writing, within seven (7) days filing

the entry of this order whether a transcript has been ordered. (See Rules 10 and 11, Alabama Rules of Appellate Procedure and Form ARAP 1, Notice of Appeal.)

Hornsby, C. J., and Maddox, Almon, Shores, Houston, Kennedy, Ingram, Cook, and Butts, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 23rd day of Aug, 1995

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1996

1941573

City of Tarrant, Alabama

v.

Melvin Jefferson, et al.

Appeal from Jefferson Circuit Court
(CV-94-4523)

MADDOX, JUSTICE.

Pursuant to Rule 3, Ala.R.App.P., we permitted the defendant City of Tarrant to appeal from an interlocutory order in which the trial court held that the question of the survivability of Alberta K. Jefferson's cause of action for compensatory damages under 42 U.S.C. § 1983 was governed by federal common law rather than by Alabama's Wrongful Death Act, § 6-5-410, Ala. Code 1975. The plaintiff Melvin Jefferson, Alberta's son, sues individually and as a personal representative for the estate of the decedent. He alleges that Tarrant firefighters, based upon a policy of selectively denying fire protection to minorities, purposefully refused to attempt to rescue and revive Alberta.

Facts

Melvin Jefferson claims that city firefighters violated Alberta Jefferson's civil rights, specifically that they inten-

tionally, negligently, wantonly, or carelessly failed to attempt to extricate her from her burning house and thereby caused her wrongful death, a death that would be actionable under § 6-5-410, Ala. Code 1975. The defendant city moved for a judgment on the pleadings, specifically as to those claims seeking compensatory damages under 42 U.S.C. § 1983; the court denied the city's motion, and this Court permitted an appeal from the denial. The defendant city maintains that the question of the survivability of Alberta Jefferson's § 1983 cause of action against the municipality is governed by Alabama law rather than federal common law, and that the trial judge erred in holding otherwise when he denied the city's motion for a judgment on the pleadings.

Issue

Is the question of the survivability of Alberta Jefferson's cause of action for compensatory damages under 42 U.S.C. § 1983 governed by federal common law or by reference to the Alabama Wrongful Death Act. This Court addressed this same issue in *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983) cert. denied, 467 U.S. 1211 (1984). Also see, *Blair v. City of Rainbow City*, 542 So. 2d 275 (Ala. 1989). This issue arises because no federal statute provides for the survivability of § 1983 claims; moreover, federal law prohibits a § 1983 award of punitive damages against a municipality¹ and compensatory damages are not available under Alabama's Wrongful Death Act, which allows an award of punitive damages only.²

¹*City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

²See, e.g., *Atkins v. Lee*, 603 So. 2d 937 (Ala. 1992).

Analysis

The trial court was aware of this Court's holding in *Carter*, but held that *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986), had, in effect, overruled *Carter*.

We have examined the principles of law stated in *Weeks* and have also re-examined the principles of law stated in *Carter*. We conclude that *Carter* correctly denied this issue. We should also note that the Supreme Court of the United States denied certiorari review of the *Carter* decision.

The rationale of *Weeks* appears to be that the application of § 6-5-410 in § 1983 actions is inconsistent with the Constitution and laws of the United States. The pertinent federal statute provides: "In all cases where [the laws of the United States] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same as not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause." 42 U.S.C. § 1988.

In *Carter* this Court, when confronted with this same issue, concluded that § 6-5-410 was not inconsistent with the Constitution and laws of the United States, citing *Robertson v. Wegmann*, 436 U.S. 584 (1978), which held that a § 1983 action would abate in accordance with Louisiana's survivorship statute. *Carter* is based in part upon *Brown v. Morgan County*, 518 F. Supp. 661 (N.D. Ala. 1981), which held that compensatory damages are not recoverable in § 1983 actions based on Alabama's Wrongful Death Act. The *Brown* court distinguished the *Brown* case from *Robertson* by noting that the Louisiana

abatement statute "[was obviously more restrictive than the Alabama wrongful death act" and that, "like the Louisiana survival statute under consideration in *Robertson*, the Alabama death act should not be disregarded and cannot be considered 'inconsistent' with federal law merely because the statute provides for recovery of only punitive damages. *Brown*, 518 F. Supp. at 663-65, quoted in *Carter*, 444 So. 2d at 377. *Robertson* states simply that state law applies in § 1983 actions seeking recovery for wrongful death unless, upon application of § 1988, it is found to unduly restrict the federal claim, *Carter*, 444 So. 2d at 377, and it states that "[a] state statute cannot be considered 'inconsistent' [or unduly restrictive] with federal law merely because the statute causes the plaintiff to lose the litigation." 436 U.S. at 593.

Furthermore, as noted earlier, the United States Supreme Court has held that a plaintiff cannot recover punitive damages against a municipality under § 1983. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). Therefore, as *Carter* states: "[S]tate law affords a remedy beyond that now permitted under federal law—punitive damages. Thus, the application of state law . . . does not, in substance, abrogate plaintiff's remedy against the city for violations of § 1983, but rather expands the recovery." *Carter*, 444 So. 2d at 379 (emphasis omitted).

"The interests sought to be protected by the Alabama wrongful death statute closely parallel the interests to be protected where death results from violations [that give rise to liability under] § 1983. Thus, the purpose of § 1983 is not defeated, nor are cities insulated from liability under § 1983, because the law of Alabama does recognize an analogous cause of action [§ 6-5-410, Ala. Code 1975], affording an appropriate remedy in death cases."

444 So. 2d at 380 (emphasis omitted).

This Court held in *Carter* that § 6-5-410, Ala. Code 1975, is not inconsistent with the Constitution and laws of the United States. We reaffirmed that holding in *Blair v. City of Rainbow City*, 542 So. 2d at 275 (Ala. 1989). We have re-examined the principles of law stated in *Carter* and *Blair*, and we conclude that the holding in those cases is still sound. The order of the trial court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Hooper, C.J., and Shores, and Kennedy, JJ., concur.

Butts, J., concurs in the result.

Houston and Cook, JJ., dissent.

City of Tarrant. Alabama v. Melvin Jefferson, et al.

HOUSTON, JUSTICE (dissenting).

I am faced with a dilemma. Should I adhere to the doctrine of state decisis, knowing that the precedent upon which I rely (*Tatum v. Schering Corp.*, 523 So.2d 1042, 1049-63 (Ala. 1988)) was wrongly decided? To follow it would be to deny the plaintiff Melvin Jefferson a remedy. Or should I follow the law as I believe it to be, although what I believe the law to be is contrary to the opinion of the majority? To follow what I believe the law to be would afford Melvin Jefferson, as personal representative of the estate of Alberta K. Jefferson, deceased, a remedy through his action under 42 U.S.C. § 1983. If a constitutional doctrine was involved, I would follow Justice Scalia's dissent in *BMW of North America, Inc. v. Gore*, [Ms. 94-896, May 20, 1996], ___, U.S. ___, ___ S.Ct. ___ (1996), as I did in *Ex parte Knotts*, [Ms. 1950239, July 12, 1996], ___ So.2d ___ (Ala. 1996) (Houston, J., concurring in the result). In this case, no constitutional issue is involved; however, I am convinced that this Court has erroneously interpreted Ala. Code 1975, § 6-5-410 (to hold that only punitive damages can be recovered in wrongful death cases), and I cannot expand this erroneous interpretation of § 6-5-410 to § 1983 actions and deprive Melvin Jefferson (or other plaintiffs similarly situated) of a right to a remedy, which after much research and analysis, I wholeheartedly believe that he and those similarly situated have. *Tatum v. Schering Corp.*, supra (Houston J., dissenting). Therefore, I respectfully dissent.

City of Tarrant, Ala. v. Melvin Jefferson, et al.

COOK, JUSTICE (dissenting).

I respectfully dissent. This Court should affirm the trial court's holding that application of the state's wrongful death statute in this fact situation would be inconsistent with the policy underlying the 42 U.S.C. § 1983 cause of action.

The majority's holding that Alabama's wrongful death statute determines whether Alberta Jefferson's § 1983 federal cause of action survives is based on this Court's opinion in *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983), and *Blair v. City of Rainbow City*, 542 So. 2d 275 (Ala. 1989). I agree with the reasoning of Justice Jones and Justice Adams, who wrote specially in *Carter* and *Blair*, respectively, and who disagreed with the idea that Alabama municipalities are exempt from a wrongful death action under § 1983 because the state recognizes an analogous cause of action.

This Court in *Carter*, based on an analysis of *Robertson v. Wegmann*, 436 U.S. 584 (1978) (holding that a § 1983 action would abate in accordance with Louisiana's survivorship statute), and *Brown v. Morgan County*, 518 F. Supp. 661 (N.D. Ala. 1981), determined that a close parallel exists between the interests being protected in actions brought under the Alabama Wrongful Death Statute and interests involved in cases where death results from violations that would give rise to liability under § 1983. Therefore, *Carter* reasoned, the purpose of § 1983 was not defeated, because under the Alabama Wrongful Death Act an appropriate remedy is provided in death cases.

The view more in accord with the policy of § 1983 is expressed in the more recent opinion of *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986). In *Weeks*, the administratrix of a deceased county jail inmate sued Baldwin

County commissioners and others under § 1983, alleging violations of the inmate's rights. Judge Hand recognized in *Weeks* that (1) the *Robertson* holding was a narrow one, limited to situations in which the application of the state survivorship law does not adversely affect the § 1983 policies of compensation and deterrence, and (2) that the *Robertson* analysis could not defend the strict application of the state's wrongful death statute in cases where alleged wrongful acts of a municipality or county resulted in the decedent's death. Such an application would allow those entities to operate with immunity from § 1983 actions based on deprivations of constitutional rights, so long as the victims of those deprivations die. *Weeks*, 649 F. Supp. at 1305-06. Providing what is in essence partial immunity to municipalities in death, cases is inconsistent with the § 1983 policy of deterrence. Addressing this issue, Judge Hand wrote:

"A strict application of the Alabama wrongful death statute in cases involving municipal or county liability cannot be justified under the *Robertson* court's analysis. The Alabama statute provides for the recovery only of punitive damages, but municipalities and counties are immune from these damages in actions under § 1983. Thus, the strict application of the Alabama statute in such cases would result in the complete immunization of those entities from damages, at least in cases where the decedent's death resulted from their wrongful acts. Alabama municipalities and counties would know, in advance, that they would never be monetarily liable under § 1983 for acts that cause deprivations of constitutional rights as long as the victims die. The policy of deterrence of official misconduct that [underlies] § 1983 would obviously be severely undermined if the Alabama wrongful death statute is applied in a way that

eliminates municipal and county liability in such cases. Moreover, § 1983's policy of compensating the victims of official misconduct would also be undermined. The *Robertson* Court specifically noted that its decision was not intended to 'preclude recovery by survivors who are suing under § 1983 for injury to their own interests.'

649 F. Supp. at 1305-06.

In *Robertson*, the decedent had no immediate survivors, so the executor was suing only on the estate's behalf. Alberta Jefferson has several survivors including the plaintiff Melvin Jefferson.

I agree with Justices Jones and Adams that "[w]e should either fashion a remedy allowing recovery of compensatory damages, or we should resort to the federal common law of survival, which allows compensatory damages as the appropriate relief." *Carter*, 444 So. 2d at 380 (Jones, J., concurring in part and dissenting in part); *Blair*, 542 So. 2d at 278 (Adams, J., concurring specially and quoting Justice Jones's statement). Moreover, because I also agree with the analysis in *Weeks*, that Alabama's wrongful death statute should not be held to foreclose the recovery of compensatory damages under § 1983, I respectfully dissent.

IN THE SUPREME COURT OF ALABAMA

August 30, 1996

1941573

City of Tarrant, Alabama Melvin Jefferson, et al.
(Jefferson: CV-94-4523)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

MADDOX, J. — Hooper, C.J., Shores, Kennedy and Butts, JJ., concur.; Houston and Cook, JJ., dissent.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 30 day of Aug, 1996

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

Dennis G. Pantazis, Esq.
1400 South Trust Tower
Birmingham, Alabama 35203

Re: 96-957 - Melvin Jefferson, individually and as the Administrator of the Estate of Alberta K. Jefferson, Leon Jefferson and Benjamin Jefferson v. City of Tarrant, Alabama

Dear Mr. Pantazis:

The Court today entered the following order in the above stated case:

"The petition for a writ of certiorari is granted limited to the following question: 'Whether, when a decedent's death is alleged to have resulted from a deprivation of federal rights occurring in Alabama, the Alabama Wrongful Death Act, Section 6-5-410 (Ala. 1975), governs the recovery by the representative of the decedent's estate under 42 U.S.C. Section 1983?'"

Enclosed are Memoranda describing the procedures under the Rules, together with a Specification Chart for your use. To further assist you in preparing your case before this Court, a copy of the Guide for Counsel is enclosed. Although this case will not be calendared for oral argument this Term, please note that requests for extensions of time to file briefs on the merits are not favored.

If you have any questions, please feel free to telephone me.

Very truly yours,
WILLIAM K. SUTER, CLERK

/s/ Sandy Nelson

Sandy Nelsen

Merits Clerk

(202) 479-3032

Enclosures